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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 172.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

CAMDEN IRON WORKS.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 31, 1900.

(17,691.)

19846

(17,591.)

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1 In the Court of Appeals of the District of Columbia.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
CAMDEN IRON WORKS. } No. 884.

In the Supreme Court of the District of Columbia.

CAMDEN IRON WORKS
vs.
THE DISTRICT OF COLUMBIA. } No. 37661. At Law.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Declaration and Rule to Plead.

Filed Feb. 26, 1895.

In the Supreme Court of the District of Columbia.

CAMDEN IRON WORKS (a Corporation), Plaintiff,
vs.
THE DISTRICT OF COLUMBIA (a Corporation), Defendant. } At Law. No. 37661.

The plaintiff, a corporation created and existing under and by virtue of the laws of the State of New Jersey, sues the defendant, a municipal corporation created and existing under and by virtue of the laws of the United States, for money payable by the defendant to the plaintiff, for that whereas by certain articles of agreement bearing date the 29th day of June, A. D. 1887, between the plaintiff corporation, acting through and by Walter Wood, its president, and sealed with its corporate seal, of the one part, and the said District of Columbia, acting through and by William B. Webb, Samuel E. Wheatley, and William Ludlow, its Commissioners, duly authorized in that behalf and sealed with their seals, of the other part, it was covenanted, promised, and agreed upon as follows, viz: First, the plaintiff corporation, for the consideration therein mentioned and contained, did covenant, promise, and agree to and with the said defendant that it, the plaintiff corporation, should and would furnish and deliver unto the defendant, in the District of Columbia,
2 the following-described cast-iron pipe, to wit: 9,000 feet, more or less, of twelve-inch cast-iron pipe; 10,000 feet, more or less, of six-inch cast-iron pipe; 15,000 feet, more or less, of four-inch cast-iron pipe, and 10,000 feet, more or less, of three-inch cast-iron pipe;

and, second, the defendant corporation, acting as aforesaid, did by said articles of agreement covenant, promise, and agree to pay the plaintiff for said pipe so to be delivered the following prices, to wit:

For the twelve-inch pipe, one and $\frac{56}{100}$ (1.56) cents per pound;

For the six-inch pipe, one and $\frac{62}{100}$ (1.62) cents per pound;

For the four-inch pipe, one and $\frac{66}{100}$ (1.66) cents per pound;

For the three-inch pipe, one and $\frac{79}{100}$ (1.79) cents per pound, upon the receipt and acceptance of said pipe, less twenty per cent. (20 %) of the amount thereof, to be retained until the completion of said contract; and the plaintiff corporation in fact says that it always from the time of making said agreement did well and truly do, observe, perform, and fulfill all and everything in said articles of agreement contained on its part to be done, observed, performed, and fulfilled, except in so far as it was prevented or discharged from so doing by the defendant, and that in the performance of said articles of agreement it did furnish and deliver to the defendant the following-described pipe, to wit, 679,785 pounds of twelve-inch pipe, 148,755 pounds of six-inch pipe, 164,366 pounds of four-inch pipe, and 33,962 pounds of three-inch pipe, the last of said pipe having been delivered by the plaintiff corporation and accepted by the defendant corporation, and the said contract thereby completed, on or about the 27th day of February, A. D. 1888; which said pipe so furnished were received and accepted by the defendant, and thereby the defendant became liable to pay the plaintiff for the pipe so delivered and accepted the sum of $16,350.87, according to the form and effect of said articles of agreement, but therein failed and made default and paid the plaintiff only the sum of $5,291.71 on account thereof, and although often requested to pay the balance of $11,059.16, still so as aforesaid remaining due the plaintiff, wholly refused to pay the same or any part thereof, and wholly neglected so to do, contrary to the form and effect of said articles of agreement made as aforesaid; by reason of which said premises and by force of said articles of agreement an action has accrued to the said plaintiff to demand and have of and from the said defendant the said sum of $11,059.16 above demanded, with interest from the 27th day of February, A. D. 1888; yet the said defendant, although often requested, did not and has not paid the said plaintiff the said sum of $11,059.16, with interest thereon from the 27th day of February, A. D. 1888, or any part thereof, but to pay the same or any part thereof has hitherto wholly refused and still refuses, to the great damage of the plaintiff, and therefore the plaintiff brings its suit.

And the plaintiff claims $11,059.16, with interest thereon from the 27th day of February, A. D. 1888, besides the costs of this suit.

SAM'L MADDOX,
Attorney for Plaintiff.

3 The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

SAM'L MADDOX,
Attorney for Plaintiff.

Defendant's Pleas.

Filed Mar. 25, 1895.

In the Supreme Court of the District of Columbia.

CAMDEN IRON WORKS
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 37661.

The defendant for pleas says:

1. The defendant did not covenant in manner and form as in the plaintiff's declaration alleged.

2. The defendant did not promise in manner and form as in the plaintiff's declaration alleged.

3. The defendant denies the said alleged breaches of the said convenants, each and every of them, in manner and form as in the plaintiff's declaration alleged, and says it did not commit the same or any of them or any part *of* thereof.

4. The defendant says it fully performed each and every covenant and agreement on its part to be done and performed as set forth in the alleged contract in the plaintiff's declaration mentioned.

5. The defendant says that before action — brought it satisfied and discharged the plaintiff's claim by payment.

6. The defendant says it never was indebted as alleged in the plaintiff's declaration.

S. T. THOMAS,
A. B. DUVALL,
Attorneys for Defendant.

Joinder of Issue.

Filed Apr. 9, 1895.

In the Supreme Court of the District of Columbia.

CAMDEN IRON WORKS
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 37661.

The plaintiff joins issue upon the defendant's first, second, third, fourth, fifth, and sixth pleas.

SAM'L MADDOX,
Attorney for Plaintiff.

4 *Defendant's Additional Pleas and Affidavit.*

Filed Dec. 16, 1896.

In the Supreme Court of the District of Columbia.

CAMDEN IRON WORKS, a Corporation,
vs.
THE DISTRICT OF COLUMBIA. } At Law. 37661.

The defendant, with leave of the court first had and obtained, files the following additional pleas:

7. The defendant for further plea says that the alleged articles of agreement bearing date the 29th day of June, 1887, in the declaration mentioned, is not its deed.

8. And for further plea the defendant says that the plaintiff at the commencement of this suit was and still is indebted to the defendant in the sum of $12,115.73 for penalties incurred by the said plaintiff by reason of its failure to perform the conditions of the said articles of agreement bearing date June 29th, 1887, between the said plaintiff and this defendant, set up in the declaration, and by reason of its failure to deliver the pipe contracted for within the contract time, and for the value of other pipe which this defendant was compelled to purchase in order to supply the place of the pipe plaintiff failed to deliver, and for the amount paid out and expended by this defendant for cost of inspection, freight, etc., in connection therewith, as appears by the particulars of said debt, hereto annexed, and it is willing that the same may be set off against the plaintiff's demand.

9. And for a further plea the defendant says that the plaintiff's cause of action did not accrue within three years before the commencement of this suit.

S. T. THOMAS,
A. B. DUVALL,
Attorneys for Defendant.

DISTRICT OF COLUMBIA, *To wit:*

Personally appeared John W. Ross, George Truesdell, and Charles F. Powell, who, being first duly sworn, depose and says they are Commissioners of the District; that the foregoing pleas are filed in this cause not for purposes of delay, but in order to enable the court to determine the merits of the matter in controversy between the plaintiff and the District of Columbia, and they further say that the alleged articles of agreement, dated January 29th, 1887, set up in the plaintiff's declaration, is not the deed of the defendant, The District of Columbia.

JOHN W. ROSS.
GEO. TRUESDELL.
CHAS. F. POWELL.

Subscribed and sworn to before me this 27th day of October, 1896.

WILLIAM TINDALL,
Notary Public.

[SEAL.]

5

Camden Iron Works to the District of Columbia, Dr.

For Pipes Purchased Outside Camden Iron Works Millville Foundry.

From Berwick, Pa.:					
3", 14 456-2240 tons, @ $41.00 (31,816 lbs.)			582.35		
6", 47 1978-2240 " " 33.50 (107,258 ")			1,604.08		
				2,186.43	
Paid freight (special rates, $.015 per 100 lbs.)				208.60	
					2,395.03
From Sayre, Pa.:					
3", 5 1176-2000 tons, @ $34.00; 11,176 lbs. @ 1.70c			189.99		
4", 54 1804-2000 " " 32.00; 109,804 " " 1.60c			1,756.86		
6", 22 648-2000 " " 31.25; 44,648 " " 1.5625c			697.62		
				2,644.47	
Paid freight and charges on above pipes				305.70	
					2,950.17
Inspectors' extra expenses on above work, less 3 weeks' board, absent from Millville					30.09
					5,375.29
For pay of inspectors at Millville after contract time, from Nov. 10 to Dec. 5, inc., 21 days, 3 4-7 weeks' board					103.64
For delays in delivering pipes on contract time:					
3" pipes, 16 days, 31,816 lbs., @ 1.79c	569.51	@ 16 $	91 12		
19 " 6,661 " " "	119.23	" 19 $	22 65		
36 " 33,962 " " "	607.92	" 36 $	218 85		
				332 62	
4" pipes, 17 days, 36,479 " @ 1.66c	605.55	@ 17 $	102 94		
18 " 25,969 " " "	431.08	" 18 $	77 59		
19 " 21,236 " " "	352.52	" 19 $	66 98		
20 " 26,120 " " "	433.59	" 20 $	86 72		
45 " 22,457 " " "	372.79	" 45 $	167 76		
76 " 4,824 " " "	80.08	" 76 $	60 86		
36 " 137,085 " " "	2,275.61	" 36 $	819 22		
				1,382 07	
6" pipes, 16 days, 143,645 " " 1.62c	2,327.05	@ 16 $	372 33		
18 " 6,685 " " "	108.30	" 18 $	19 49		
6 " 94,525 " " "	1,531.30	" 6 $	91 88		
36 " 54,230 " " "	878.53	" 36 $	316 27		
				799 97	
12" pipes, 45 days, 194,109 " " 1.56c	3,028.10	@ 45 $	1,362 64		
76 " 108,123 " " "	1,686.72	" 76 $	1,281 91		
85 " 37,198 " " "	580.29	" 85 $	493 25		
45 " 72,649 " " "	1,133.32	" 45 $	509 99		
54 " 56,309 " " "	878.42	" 54 $	474 35		
				4,122 14	
					6,636 80
					$12,115 73

Replications to Seventh and Eighth Pleas.

Filed Jan. 8, 1897.

In the Supreme Court of the District of Columbia.

CAMDEN IRON WORKS
vs.
DISTRICT OF COLUMBIA. } At Law. No. 37661.

1. The plaintiff joins issue upon the defendant's seventh plea.

2. And the plaintiff, for replication to the defendant's eighth plea, says it never was indebted to the defendant in manner and form as in said plea alleged.

SAM'L MADDOX,
Attorney for Plaintiff.

6 *Demurrer to the Ninth Plea.*

Filed Jan. 8, 1897.

In the Supreme Court of the District of Columbia.

CAMDEN IRON WORKS
vs.
DISTRICT OF COLUMBIA. } At Law. No. 37661.

The plaintiff says the ninth plea of the defendant is bad in substance.

SAM'L MADDOX,
Attorney for Plaintiff.

NOTE.—One of the matters of law intended to be argued is that the said plea is not responsive to the declaration, and presents no triable issue, for the reason that the plea alleges that the cause of action did not accrue within three years, when by laws in force in the District of Columbia a plea of the statute of limitations in an action of covenant upon a sealed instrument should aver that the cause of action did not accrue within twelve years.

Stipulation.

Filed Jan. 8, 1897.

In the Supreme Court of the District of Columbia.

CAMDEN IRON WORKS
vs.
DISTRICT OF COLUMBIA. } At Law. No. 37661.

It is hereby stipulated between counsel for the plaintiff and for the defendant that the demurrer to the ninth plea shall be heard at the trial of this cause.

S. T. THOMAS,
A. B. DUVALL,
Attorneys for the District of Columbia.
SAM'L MADDOX,
Attorney for Camden Iron Works.

Memorandum.

March 13, 1897.—Demurrer to ninth plea sustained.

Memorandum.

January 23, 1899.—Verdict for plaintiff for $11,044.16, with interest from February 27, 1888.

7 Supreme Court of the District of Columbia.

SATURDAY, *February* 4, 1899.

Session resumed pursuant to adjournment, Justice Bradley presiding.

* * * * * * *

CAMDEN IRON WORKS, a Corporation, Pl'ff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 37661.

Upon hearing the defendant's motion for a new trial, it is considered that the same be, and hereby is, overruled and judgment on verdict is ordered. Therefore it is considered that the plaintiff recover against the defendant eleven thousand and forty-four dollars and sixteen cents ($11,044.16), with interest thereon from the 27th day of February, 1888, being the money payable by it to the plaintiff by reason of the premises, together with its costs of suit, to be taxed by the clerk, and have execution thereof.

Order for Appeal to Court of Appeals.

Filed Feb. 6, 1899.

In the Supreme Court of the District of Columbia, the 6 Day of February, 1899.

CAMDEN IRON WORKS
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. —.

The clerk of said court will please enter an appeal to the Court of Appeals from the judgment granted in the above cause and issue citation to plaintiff.

S. T. THOMAS,
A. B. DUVALL,
Attorney- for Defendant.

In the Supreme Court of the District of Columbia.

CAMDEN IRON WORKS, a Corporation,
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 37661.

The President of the United States to the Camden Iron Works, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the clerk's office, supreme court of the District of Columbia, on the 6th day of February, 1899, wherein The District of Columbia is appellant and you are appellee, to show cause, if any

there be, why the judgment rendered against the said appel-
8 lant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 6th day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

Seal Supreme Court of the District of Columbia.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 8th day of February, 1899.

SAM'L MADDOX,
Attorney for Appellee.

Supreme Court of the District of Columbia.

THURSDAY, *February* 23, 1899.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

This case was tried by Justice Bradley.

THE CAMDEN IRON WORKS
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 37661.

Now again comes here the defendant, by its attorneys, and tenders to the court here its bill of exceptions taken during the trial of this cause, and prays that the same may be duly signed, sealed, and made part of the record, now for then, which is done accordingly.

Bill of Exceptions.

Filed Feb. 23, 1899.

In the Supreme Court of the District of Columbia.

THE CAMDEN IRON WORKS
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 37661.

Be it remembered that at the trial of this cause, on the 23rd day of January, A. D. 1899, before the Honorable A. C. Bradley, associate justice of the supreme court of the District of Columbia, and a jury regularly impaneled and sworn to try the issues joined between the plaintiff and the defendant, the plaintiff, to maintain and prove the issues on its part joined, produced as a witness WILLIAM TINDALL, who testified on direct examination as follows:

That he is secretary of the Board of Commissioners of the District of Columbia. The witness thereupon produced the original

contract mentioned in the declaration in this cause, and
9 testified that the signatures of William B. Webb, Samuel E. Wheatley, and William Ludlow to said contract No. 815 were their genuine signatures, and that they were at the time of the signing of said contract Commissioners of the District of Columbia; that this contract had been duly copied in a book kept for that purpose in the office of the Commissioners, as required by the act of Congress approved June 11, 1878.

Whereupon counsel for the plaintiff offered to give said contract in evidence.

To which offer counsel for the defendant, at the time the same was made and before the said contract was given in evidence, objected upon the ground that the declaration filed in this cause is in covenant and declares upon a sealed instrument, whereas the contract offered in evidence to the jury is not under the seal of the District of Columbia and is not the covenant, but the simple contract, of the District of Columbia; but the presiding justice overruled said objection and permitted said contract to be given in evidence to the jury.

To the action of the court overruling said objection and permitting said contract to be read to the jury the defendant, by its counsel, excepted, and the exception was noted by the justice presiding on his minutes before the jury retired to consider of their verdict; and the defendant, by its counsel, requested the court to sign and seal this its first bill of exceptions, which is accordingly done, *nunc pro tunc*, this the 23d day of February, A. D. 1899.

A. C. BRADLEY, *Justice.* [SEAL.]

Said contract No. 815 was then offered and read to the jury, and is in words and figures following, to wit:

Copy.

Filed Dec. 16, 1896.

No. 815.

This contract, made and concluded this twenty-ninth day of June in the year one thousand eight hundred and eighty-seven by and between the District of Columbia, of the first part and the Camden Iron Works by Walter Wood, president, of the second part, witnesseth:

First. That the said party of the second part has agreed, and by these present does agree with the said party of the first part, for the consideration hereinafter mentioned and contained, and under the penalty expressed in a bond bearing even date with these presents, and hereunto annexed, to furnish all necessary labor and materials, and in a good, firm and substantial manner, in strict accordance with the printed specifications, modified in writing, and the general stipulations hereunto attached and made a part of this contract, — furnish and deliver as herein indicated, the following materials, to wit:

9,000 feet, more or less, of twelve-inch cast-iron pipe.
10,000 feet, more or less, of six-inch cast-iron pipe.
10 15,000 feet, more or less, of four-inch cast-iron pipe.
10,000 feet, more or less, of three-inch cast-iron pipe.

Specifications.

Quantity.

The work to be done consists in furnishing and delivering 9,000 feet of 12-inch, 10,000 feet of 6-inch, 15,000 feet of 4-inch, and 10,000 feet of 3-inch cast-iron water pipe; [100,000 pounds of special castings for use in connection therewith. Also, the following water valves: 2, size 20 inches; 10, size 12 inches; 2, size 10 inches; 12, size 6 inches; 12, size 4 inches; 30, size 3 inches all two-way valves; 30 6-inch four-way valves; 5 6-inch five-way valves; 10 6-inch three-way valves].* The quantities are to be considered approximate only, and the Commissioners reserve the right to increase or diminish the orders, not exceeding twenty (20) per cent. of the above amounts. The right is also reserved to award contracts for the whole amount or for any part, as, in the opinion of the Commissioners, may best serve the interest of the Government, and bids for the whole or any part will be considered.

Description.

Straight pipes.—The straight pipes shall be circular cylinders, with concentric inner and outer surfaces, and of such length as to lay at least twelve (12) feet in each section. The bells and spigots must conform strictly with the drawings and specifications to be furnished.

Thickness and weight of pipe.—The thickness of the 12″ pipe shall be $\frac{9}{16}$ of an inch, and the weight of each section 900 pounds; permitted deviation, 3 per cent.

The thickness of the 6″ pipe shall be $\frac{7}{16}$ of an inch, and the weight of each section 360 pounds; permitted deviation, 3½ per cent.

The thickness of the 4″ pipe shall be $\frac{3}{8}$ of an inch, and the weight of each section 216 pounds; permitted deviation, 3½ per cent. The thickness of the 3″ pipe shall be $\frac{5}{16}$ of an inch, and the weight of each section 158 pounds; permitted deviation, 3½ per cent.

For any excess in any section of pipe above the permitted deviation no payment will be made.

The seat or shoulder of the bell and the end of the spigot must be straight and even, so as to make a smooth joint.

No pipe will be accepted whose eccentricity at either bell or spigot end shall exceed one-eighth ($\frac{1}{8}$) of an inch.

Space for lead joint.—All pipes of twelve inches diameter and under are to be formed so as to give a space for lead joint not less than five-sixteenths of an inch all around, nor more than three-eighths.

[* Words and figures enclosed in brackets erased in copy.]

11 All pipes larger than twelve inches diameter shall have space for lead joint not less than three-eighths of an inch and not more than seven-sixteenths. No pipe will be accepted which is defective in space for joint, whether in consequence of eccentricity of form, or otherwise.

Special castings.—All branches, curves, goose-necks, sleeves, and other necessary connecting pieces shall conform in form and dimensions of parts with drawings and instructions of the Engineer Commissioner.

Lugs shall be cast on any or all pipes and special castings as may be shown on drawings or as directed by the Engineer Commissioner.

Patterns.—All patterns are to be furnished by the contractor and be approved by the Engineer Commissioner, or his agent, before castings are made from them.

All tools, materials, labor, and expenses necessary to the proper manufacture, inspection, weighing, and delivery of the pipes and castings shall be furnished by and at the cost of the contractor, excepting only the salary of the inspector to be appointed by the Engineer Commissioner.

Metal.—The metal of which the castings are to be made shall be iron, remelted in a cupola or air furnace, and of such make as shall be approved by the Engineer Commissioner.

It shall be without any admixture of cinder iron or other inferior metal, entirely free from uncombined carbon when seen under the microscope, and shall admit of being easily drilled or cut. The iron in the pipe shall have a tensile strength of at least sixteen thousand (16,000) pounds to the square inch.

Vertical casting.—All pipes shall be cast vertically in flasks of uniform length for each size, with the bell end down, and shall be made in such moulding, sand or loam as will leave the surface in good condition to receive the coal-tar varnish. The 3 and 4 inch pipes may be cast bell end up.

Pipes to be marked.—Every pipe, branch, or other separate casting, shall have cast upon it the initials of the maker's name, the year in which it was cast, and the running number of the castings of the same size and kind; the letters and figures to be cast upon the outside, and not less than two inches in length and one-eighth inch in relief. Duplicate numbers should not be used.

Quality of castings.—All pipes and castings shall be free from scoriæ, sand holes, air bubbles, cold-shut cracks, and other defects or imperfections; shall be truly cylindrical in the bore, straight in the axis, of equal thickness throughout, and internally of the full specified diameters; plugging or filling will not be allowed.

Cleaning.—Every casting must be thoroughly dressed and made entirely clean and free from rust, earth, sand, and dust. Iron wire brushes must be used as well as softer brushes to remove the loose dust. No acid or other biting liquid shall be used in cleaning the castings. No lumps shall be left on the inner surfaces in the barrels or sockets or on the outer surface of the spigot end.

12 Hammer inspection.—All castings, after being cleaned under the direction of the inspector, shall be subjected to a careful and thorough hammer inspection.

Gauges.—The bells and spigots will be tested by suitable gauges

Caliper test.—The thickness of the metal of the pipes and special castings will be tested by calipers. No pipe will be received when the thickness of metal is less by more than one-twelfth ($\frac{1}{12}$) of an inch for the 12-inch pipe, or one-sixteenth ($\frac{1}{16}$) of an inch for the 3, 4, and 6 inch pipe, than the thickness required by the specifications and drawings.

Coating.—Every pipe, branch, and special casting shall be carefully coated inside and out with coal-tar pitch and oil, in accordance with the following rules:

No pipe to be dipped after rust has set in.

The coal-tar pitch to be made from coal-tar, distilled until the naphtha is entirely removed and the material deodorized. It should be distilled until it has about the consistency of wax when cold. The mixture of five or six per cent. of linseed oil is recommended. Pitch which becomes hard and brittle when cold will not answer.

The pipes will be heated in an oven to a temperature of 300 degrees Fahrenheit, and then dipped in the tar pitch and allowed to remain from one to fifteen minutes, according to size and temperature of pipe and condition of tar.

The application must be made to the satisfaction of the Government inspector, and the material and process be subject at all times to his examination, inspection, and approval.

The proper coating will be tough and tenacious when cold on the pipes, and not brittle or with any tendency to scale off. No pipe will be accepted the coating of which, for any reason, is unsatisfactory.

Pressure test.—After dipping, and when dry and cool, the castings will be subjected to a hydrostatic pressure of 300 pounds to the square inch. While under pressure the hammer test shall be applied, and any casting which shows defect by leaking, sweating, or otherwise, will be rejected. If the Engineer Commissioner shall so determine, they shall be subjected to further test after delivery and before final acceptance.

Weight to be marked.—After coating the castings will be weighed in the presence of the inspector, and the weight distinctly marked on the casting with white paint. The contractor shall provide, at the foundry where the pipes and castings are to be manufactured, proper officially sealed scales and weights for weighing the castings.

If the Engineer Commissioner shall so decide, the pipes and castings may be weighed after delivery, and the weights so ascertained shall be used in the final settlement of the account.

No approval by the inspector shall prevent ejection for any defects which may be discovered before the final inspection and acceptance.

13 Final inspection.—The final inspection will be made after the castings have been delivered.

Condemned pipes to be removed.—If any castings shall be condemned as unsuitable under this contract, the said contractor shall forthwith, at his own expense, remove the same, and not again present them for inspection.

The contractor shall place the castings in such position as the inspector may require, and will remove them when required for convenience of inspection.

[Valves.—The valves must be of some standard manufacture, capable of resisting a pressure of 300 lbs. per square inch, and satisfactory in all their details to the Engineer Commissioner. Detail drawings to be submitted with the proposal.]*

Delivery.

All material will be delivered on such wharves in the District of Columbia as may be ordered by the Engineer Commissioner, or on the cars at either railroad depot in the city of Washington. The contractor will send with each shipment a schedule giving the consecutive numbers and weight of each pipe and special casting sent at that time, and of the valves and specials, all to be certified by the inspector.

One-half of each size of straight pipe must be delivered on or before [August 1st,]* September 25, 1887, the remainder on or before [September 15th, 1887]* Nov. 10th, 1887.

[Special castings ordered must be delivered within 30 days of order being given.

The following valves must be delivered on or before August 1, 1887: Two 20″ valves, six 12″ valves, 6 6″ valves, six 4″ valves, fifteen 3″ valves, ten 6″ four-way valves, three 6″ five-way valves, five 6″ three-way valves, and the remainder must be delivered on or before September 15, 1887.]*

In case the deliveries are not made as above specified there will be deducted from the contract prices as herein specified, one per cent. of the contract price for all delinquent articles for each and every week day that they remain delinquent.

Payments.—Payments will be made after August 1st and September 15th for all pipes, valves, and castings received and accepted in proper order and condition and in accordance with these specifications, less twenty (20) per cent. of the amount found due, to be reserved until the satisfactory completion of the contract.

General inspection.—The whole process of the manufacture of the pipes and castings shall be open at all times to the inspection of the Engineer Commissioner, or his authorized agent. Specimen castings of the metal used suitable for a testing machine shall be made when desired by him, and such castings must bear a tensile strain of sixteen thousand (16,000) pounds per square inch.

14 No metal, mould, or core, which, in his opinion, may not be proper for the purpose for which it is intended shall be used. He shall approve or disapprove the process of cleaning and testing the pipes, the preparation and application of the pitch varnish, and, in general, the form, size, uniformity, and condition of all castings. He may reject, without proving, any casting which is not in con-

[* Words and figures enclosed in brackets erased in copy.]

formity with the specifications and drawings. On all questions the decision of the Engineer Commissioner shall be final.

To prevent disputes and litigations, it is expressly understood that the decisions of the Engineer Commissioner shall be final as to the acceptance or rejection of any pipe, casting, or valve delivered, and that he shall decide as to the meaning and intent of these specifications, or any obscurity in the wording of them; and, further, that he shall have the right to correct any errors or omissions in them necessary for the proper fulfillment of their intention; the action of such correction to date from the time that the Engineer Commissioner gives due notice thereof.

The prices bid must cover the entire cost to the District of Columbia for the pipes, casting-, and valves finally accepted under the provisions of these specifications, including freight, wharfage, &c.; and for any extra work or change due to any alteration or correction in said specifications, the fair price to be paid shall be determined by the Engineer Commissioner and stated in writing by him at the time such extra work or change is ordered, otherwise no claim for any payment above the regular contract price will be allowed, nor will any claim for extra work be admitted if such work shall have been done without a written order from the Engineer Commissioner antedating the execution of the same.

Whenever the words Engineer Commissioner are used, they refer as well to his authorized agents limited to the particular duties entrusted to them in writing.

General Conditions, 1887–'8.

1. All loss or damage arising out of the nature of the work to be done, or from any unforeseen or unusual obstructions or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, will be sustained by the contractors.

2. Failure to commence the work at the time specified, or to prosecute it thereafter in a satisfactory manner and at a rate of progress necessary, in the opinion of the District Commissioners, for its entire completion within the limits of time fixed by the contract, will be authority for the said Commissioners to suspend the contractors from the work and employ other parties to complete it. All money due the contractors at the date of suspension will be retained until the delivery is completed, and be applied to the payment of any increased cost thereof, and any excess of cost, over and above the amount so retained, will be charged against the contractor and sureties, who will each and severally be held liable therefor.

3. The contractor must be prepared to do any extra work that may, with the approval of the Commissioners of the District, be ordered the Engineer Commissioner arising out of any modification in the plans or details that may appear necessary, and for this he will be paid at the contract rates for work of a similar character, or, if the extra work should be of a class for which no rate is fixed by the contract, the fair price to be paid will be determined by the Engineer Commissioner, but no authority for

extra work will be recognized except the written order of the Engineer Commissioner.

4. Inspectors will be appointed, whose duty it shall be to point out to the contractors any neglect or disregard of the specifications of contracts, but the right of final acceptance or condemnation of the work will not be waived at any time during its progress Contractors will be held responsible for the faithful execution of their contracts; and upon all technical questions concerning the execution of the work, in accordance with the specifications and the measurements thereof, the decision of the Engineer Commissioner of the District of Columbia shall be final.

5. Payments will be made as specified, upon estimates approved by the Engineer Commissioner, less 20 per cent. of each estimate, to be withheld until the final payment, which will only be made upon the certificate of the said Commissioner that the work has been completed and properly executed to the satisfaction of a majority of the Board of Commissioners.

6. Good and sufficient bonds to the United States in a penal sum equal to the estimated amount of the contract, with sureties to be approved by the Commissioners of the District of Columbia, will be required from all contractors, guaranteeing that their contract will be strictly and faithfully performed to the satisfaction of, and acceptance by, said Commissioners.

7. All work must be commenced within — days, and completed within 136 days after the date of the execution of the contract; if not so completed, the pay of all inspectors employed on the work after the time fixed for its completion will be charged against and deducted from any money that may be due or become due the contractor, as well also the sum of ten dollars ($10.00) *per diem* for the same period, estimated as liquidated and fixed damages to the District arising from failure to complete the work at the time specified—time of completion of the contract being an essential element and consideration.

8. Contractors will punctually pay the workmen who shall be employed by them upon the work under their contract, in cash current, and not in what is denominated store pay or orders, and will, from time to time, and as often as may be required by the Commissioners of the District of Columbia, furnish to said Commissioners satisfactory evidence that all persons who have done work or furnished materials have been paid as herein required. And if such evidence is not furnished, such sum or sums as may be necessary for such payment may, in the discretion of the said Commissioners, be retained until such claims shall be fully satisfied.

9. No contract or any interest therein shall be tranferred by the parties to whom the award is made. It is a condition of all
16 contracts that such tranfers will be null and void, and will cause the contract to be annulled and the work to be given to other parties under the conditions mentioned in paragraph 2 of these general conditions.

Second. It is further agreed that the party of the second part shall

receive for furnishing and delivering the aforesaid materials, the following prices, viz:

For the twelve-inch pipe, one $\frac{56}{100}$ (1.56) cents per pound.
For the six-inch pipe, one $\frac{62}{100}$ (1.62) cents per pound.
For the four-inch pipe, one $\frac{66}{100}$ (1.66) cents per pound.
For the three-inch pipe, one $\frac{79}{100}$ (1.79) cents per pound.
Payments to be made in warrants for cash upon the United States Treasury.

In witness whereof, the undersigned, William B. Webb, Samuel E. Wheatley, and William Ludlow, Commissioners of the District of Columbia, appointed under the act of Congress entitled "An act providing a permanent form of government for the District of Columbia," approved June 11, 1878, and the party of the second part to these presents have hereunto set their hands and seals the day and year first above written.

(Signed) WILLIAM B. WEBB, [L. S.]
(Signed) S. E. WHEATLEY, [L. S.]
(Signed) WILLIAM LUDLOW, [L. S.]
Commissioners of the District of Columbia.

[Corporate Seal Camden Iron Works.]

(Signed) WALTER WOOD,
Pres't Camden Iron Works.

Signed and sealed in the presence of—
(Signed) E. H. DIEFFENBACH.

Know all men by these presents that we, The Camden Iron Works, by Walter Wood, president, as principal, and George Wood and Samuel R. C. Mathews, as sureties, of the city of Philadelphia, State of Pennsylvania, are held and firmly bound unto the United States of America in the sum of twenty-three thousand (23,000) dollars, lawful money of the United States of America, to be paid to the said United States; for which payment, well and truly to be made, we and each of us do bind ourselves and each of our heirs, executors, administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated this twenty-ninth day of June, A. D. one thousand eight hundred and eighty-seven.

Whereas the above-bounden The Camden Iron Works, by Walter Wood, president, by an instrument in writing under his hand and seal, bearing even date with these presents, has contracted with the District of Columbia to furnish all necessary labor and materials, and in a good, firm, and substantial manner, in strict accordance with the terms, specifications, and general stipulations of the foregoing contract, furnish and deliver the following-named material, to wit:

17 9,000 feet, more or less, of twelve-inch cast-iron pipe;
10,000 feet, more or less, of six-inch cast-iron pipe;

15,000 feet, more or less, of four-inch cast-iron pipe;
10,000 feet, more or less, of three-inch cast-iron pipe; and

Approved:
(Signed) WILLIAM B. WEBB,
(Signed) S. E. WHEATLEY,
(Signed) WILLIAM LUDLOW,
Commissioners, D. C.

on the conditions and for the considerations in the aforesaid contract mentioned and contained or referred to therein:

Now, therefore, the conditions of the obligation are such that if the said The Camden Iron Works, by Walter Wood, president, shall strictly and faithfully perform, to the satisfaction and acceptance of the Commissioners of the District of Columbia, the work to be done by the Camden Iron Works, by Walter Wood, president, in accordance with the stipulations of said contract, and in every respect fully comply with the provisions and requirements therein contained, then this obligation to be void; otherwise to remain in full force and virtue.

CAMDEN IRON WORKS. [L. S.]
(Signed) WALTER WOOD, *Pres't.* [L. S.]
(Signed) GEORGE WOOD. [L. S.]
(Signed) SAMUEL R. C. MATHEWS. [L. S.]

Signed and sealed in the presence of—
(Signed) E. H. DIEFFENBACH.

Bondsmen's Oath.

STATE OF PENNSYLVANIA, } ss:
County of Philadelphia, }

I, George Wood, being duly affirmed, depose and say that I reside in the city of Philadelphia, State of Pennsylvania; that I am a freeholder therein, and that the value of my real estate, over and above all debts and liabilities, is over twenty-three thousand dollars ($23,000), and that I am fully responsible for the amount of my obligation in the foregoing bond by me executed.

(Signed) GEORGE WOOD.

Affirmed and subscribed this 29th day of June, 1887, before me—

JAMES CROWE,
Notary Public.

18 STATE OF PENNSYLVANIA, } ss:
County of Philadelphia, }

I, Sam'l R. C. Mathews, being duly affirmed, depose and say that I reside in the city of Philadelphia, in the State of Pennsylvania, and that the value of my property, over and above all debts and liabilities, is over twenty-three thousand dollars ($23,000), and that

I am fully responsible for the amount of my obligation in the foregoing bond by me executed.

(Signed) SAMUEL R. C. MATHEWS.

Affirmed and subscribed this 29th day of June, 1887, before me—

(Signed) JAMES CROWE.

That after signing and sealing said first bill of exceptions, hereby made part hereof, to further maintain the issues on its part joined, the plaintiff further examined the witness TINDALL, who testified, in continuance of his direct examination, that after the office of secretary to the governor of the District of Columbia was abolished, in 1874, no action was taken by the temporary Board of Commissioners, appointed under the act of Congress approved June 20, 1874, looking to the adoption of a corporate seal for the District, and none by the permanent board, approved by the act of Congress of June 11, 1878, until September 23, 1887, when the Board of Commissioners, consisting of William B. Webb, Samuel E. Wheatley, and William Ludlow, passed an order that the seal of the District of Columbia, as adopted by an act of the Legislative Assembly of August 3, 1871, be placed in the official charge and custody of the secretary of the Board of Commissioners of the District of Columbia. Under said act of assembly the secretary to the governor of the District of Columbia was made the custodian of the seal, and after this office was abolished by the act of June 20, 1874, the seal had remained in the custody of the District Commissioners.

On cross-examination the witness further testified that this seal was not generally used until after the contract heretofore offered in evidence in this cause had been entered into by the parties thereto, but was affixed to deeds conveying real estate of the District and bonds and securities of the District, and in some cases to tax deeds issued by it.

And thereupon the plaintiff further gave evidence by one ALEXANDER MCKENZIE, who testified on direct examination that he was the principal accounting clerk in the office of the auditor of the District and had been for fifteen years; that the total amount of iron pipe of all kinds delivered to and received by the District from the Camden iron works under said contract No. 815 was 1,025,943 pounds, as follows:

19

Nov. 18, 1887.	4″ pipe	22,457 lbs.
	6″	94,525
	12″	194,109
Dec. 24,	3″	33,962
	4″	141,909
	6″	54,230
	12″	108,123
Jan. 6, 1888.	12″	109,847
Jan. 17,	12″	56,309

And thereupon counsel for the plaintiff asked the said McKenzie: Was there not some pipe received later than that? Did you read the item that was delivered on the 27th day of February, 1888?

To which question, at the time the same was asked and before it was answered, counsel for the defendant objected, upon the ground that it was an attempt to prove performance of the contract after the time limited therein had expired, and that no recovery could be had under the contract offered in evidence for such pipe; but the presiding justice overruled said objection and permitted said question to be answered.

To the action of the court in overruling said objection and allowing said question to be answered the defendant, by its counsel, excepted, and the exception was noted by the justice presiding on his minutes before the jury retired to consider of their verdict; and the defendant, by its counsel, requested the court to sign and seal this its second bill of exceptions, which is accordingly done, *nunc pro tunc*, this the 23d day of February, A. D. 1899.

A. C. BRADLEY, *Justice.* [SEAL.]

Whereupon the witness answered that 210,472 pounds of pipe were received and accepted by the District of Columbia on the 27th day of February, 1888; that the value of all pipe furnished by the plaintiff at contract rates was $16,335.87, on which there was paid in cash $5,291.71; the balance, or $11,044.16, was charged as fines and penalties for not delivering the pipe within the time specified in the contract.

The witness thereupon produced a statement of the account as made up in the office of the District auditor, and in reply to a question of plaintiff's counsel stated that the account showed that against the consignment of pipe received by the District on the 27th day of February, 1888, worth at contract rates $3,283.36, there was a charge of 89 % as for delay for that number of days in delivery, amounting to $2,922.19, and a *per diem* penalty at $10 a day, or $890, besides. Other fines were charged under the one per cent. per day penalty clause of the contract, ranging from 85 to 16 % of the value of the several consignments. These charges were predicated upon the theory that the contract took effect from its date.

20 Thereupon the plaintiff further gave evidence by WALTER WOOD, who testified on direct examination that he was the president of the plaintiff company, and that he had signed the contract offered in evidence as such president; that the business of the plaintiff corporation was and is the manufacture of iron castings and water pipes; that he has had thirty years' experience in the manufacture of such pipe, having started as a workman in the foundry; that the foundry at Millville has as good facilities as any in the country and had at the time the contract was signed; that from 200 to 250 men are there employed.

Whereupon counsel for the plaintiff asked the witness the following question:

When was that contract (contract No. 815) signed and acknowledged by you?

To which question, at the time the same was asked and before the witness answered it, counsel for the defendant objected, upon the ground that, the court having ruled said contract was a specialty, parol evidence was not admissible to show that the contract was executed on a different day from that recited therein; but the justice presiding overrules said objection and permitted the witness to answer the question.

To the action of the court in overruling said objection and allowing said witness to answer the question the defendant, by its counsel, excepted, and the exception was noted by the justice presiding on his minutes before the jury retired to consider of their verdict; and the defendant, by its counsel, requested the court to sign and seal this its third bill of exceptions, which is accordingly done, *nunc pro tunc*, this 23d day of February, A. D. 1899.

A. C. BRADLEY, *Justice.* [SEAL.]

Whereupon the witness further testified that he signed and acknowledged the said contract as president of the plaintiff company on the 29th day of June, A. D. 1887, and forwarded it the same day by mail to the District Commissioners, at Washington. At this time the contract had not been signed by the District Commissioners.

Whereupon, to further maintain the issues on its part joined, counsel for the plaintiff offered in evidence the correspondence between the parties, without objection, as follows:

WASHINGTON, *June 16th*, 1887.

Camden Iron Works, 400 Chestnut St., Philadelphia, Pa.

GENTLEMEN: I am instructed by the Commissioners D. C. to transmit herewith contract (in triplicate) awarded you for furnishing the District of Columbia with the following amount of water pipe, viz:

21 9,000 ft. 12″ pipe,
10,000 " 6″ "
15,000 " 4″ "
10,000 " 3″ " more or less—

under your proposal submitted on the 10th inst. for execution on the part of your company.

The contract and accompanying bond will be signed as indicated thereon in pencil. There must be two or more sureties, who must not be officers of the company. The sureties should qualify on the blanks attached before a notary public or clerk of court of record. If before a notary public, his appointment shall be certified to by the clerk of the court.

Upon the execution of the contracts as herein indicated you are requested to return the same to this office for execution on the part of the Commissioners.

Very respectfully,

EUGENE GRIFFIN,
Captain of Engineers, U. S. A.

JUNE 22ND, 1887.

William Ludlow, eng., water commissioners, Washington, D. C.

DEAR SIR: Yours enclosing the copies of contract came duly to hand. Your request that the bondsmen should not be of the officers of the company has compelled us to wait until Mr. George Wood, who was on our bond previously for Washington, should return to the city. We write this so that you may understand the apparent delay in returning you the contract.

In the matter of deliveries, to which we have alluded previously in our letters, would say that it will be impossible for us to carry them out in the manner you suggest any earlier than the 15th of September and the 1st of Nov. If it could be worded differently, other dates could be inserted in their stead, the trouble being that you have asked one-half of each size to be delivered by the dates that go into the contract. We can give you the 12″ earlier, but of 3, 4, and 6's we have heavy engagements, having taken just at the time of your letting several contracts.

We have recently been making some changes in our mode of manufacture of 3″ pipe, which is not in accordance with the wording of the specifications. We do not mean to intimate that you alter the specifications on this account, as we can make the pipe as you ask for, but if changed we can give you better delivery and better pipe. Suppose we send you a sample of what we are making and let you see it. If it meets your approbation, we can arrange earlier times for you than otherwise would be the case.

Yours very truly,

WA-TER WOOD
Pres't Camden Iron Wo.
M. H.

(Dictated.)

22

WASHINGTON, *June 25th*, 1887.

To the Camden Iron Works, 400 Chestnut St., Philadelphia, Pa.:

I am instructed by Col. Ludlow to inform you that no modifications will be permitted in regard to the contract for water pipe. It is requested that you will return contract properly completed at the earliest date possible.

Very respectfully,

THOMAS W. SYMONS,
Capt. of Eng.

JUNE 29TH, 1887.

Thomas W. Symons, capt. of eng., water commissioners, Washington, D. C.

DEAR SIR: We had yours of June 25th duly at hand, and since its receipt have had the contracts and bonds signed and acknowledged and send them by this mail.

The modification we suggested in the matter of 3″ pipe we do not desire to press upon you department. We would, however, ask that you have the weights and thicknesses of the pipes set down in the contract examined. According to our figures there is some

discrepancy between the stated thickness and the weights named, especially in the 3″. All our figuring has been based upon the weights that are given.

We would have been glad to have been able to have met your wishes in the matter of delivery, but what it is impossible to do, of course, one cannot contract to carry out. As we wrote you in our previous letter, we, unfortunately for ourselves, had a large number of offers for piping accepted during the time that you held our bid in your hands for acceptance. This will make it impossible for us to observe the deliveries originally asked for, and which we could have done at the time when the offer was made.

We have made these changes in the contract. We are,

Yours very truly, WALTER WOOD,
Pres. C. I. W.

Dictated.
Enclosures.

JUNE 29TH, 1887.

Washington Water Supply Co., Washington, D. C.

GENTLEMEN: Please send us blank specifications covering the contract which you have recently awarded us.

Very truly, R. D. WOOD AND CO.,
Per B. A. KNIGHT.

WASHINGTON, *June 30th*, 1887.

Messrs. R. D. Wood & Co., Phila., Pa.

GENTLEMEN: In reply to your communication of June 29th, blank forms of proposals and specifications for furnishing cast-iron water pipes, castings, etc., for the water department, D. C., are herewith enclosed.

Very truly, JNO. J. BEALL,
Chief Clerk W. D.

23 WASHINGTON, D. C., *July 9th*, 1887.

To the Camden Iron Works, 400 Chestnut St., Phila., Pa.

GENTLEMEN: Will you please inform us when you will be ready for inspection on pipe for use of the District of Columbia?

Very respectfully, T. W. SYMONS,
Captain of Engineers, U. S. A.

PHILA., *7th Mo., 12th*, 1887.

Col. Wm. Ludlow, Eng. Comm., Washington, D. C.

DEAR SIR: We sent you some days since contracts executed in triplicate, but have not yet received our copy. Please let us have it by return mail; also the $4,000 check which we deposited with you with proposal. As our payments are very heavy at present, your attention by return mail will oblige,

Yours truly, CAMDEN IRON WORKS.
WM. E. NEWHALL, *Treas.*

WASHINGTON, *July* 13, 1887.

W. E. Newhall, Esq., treas. Camden iron works, 400 Chestnut St., Phila., Pa.

SIR: In reply to your letter of 7th inst., just to hand, I transmit herewith your certificate of deposit for $4,000.00 on Philadelphia national bank, heretofore enclosed with your proposal for furnishing cast-iron water pipe. Please acknowledge.

Very respectfully, JOSEPH C. ROCK,
Chief Clerk.

PHILA., *7th Mo.*, 14*th*, 1887.

Joseph C. Rock, Esq., chief clerk, District of Columbia, Washington, D. C.

DEAR SIR: Yours of 15th inst. at hand, with enclosure, certificate of deposit returned. Accept thanks.

Yours truly, R. D. WOOD AND CO.
PERROT.

PHILA., *7th Mo.*, 21*st*, 1887.

Col. William Ludlow, Eng. Comm., Washington, D. C.

DEAR SIR: We have been looking daily to receive from you our copy of the contract with you for furnishing pipe. We shall be ready to start making them very soon, but, of course, cannot do so until we have the proper papers. Please let us have it by return mail, and oblige,

Yours very truly, CAMDEN IRON WORKS,
Per J. M. H.

PHILA., 8*th Mo.*, 4*th*, 1887.

Col. William Ludlow, Comm., Washington, D. C.

DEAR SIR: We shall be ready to have you send us an inspector for your pipe on about Aug. 12th; will advise you later
24 as to exact date, and write this in accordance with your request that we let you know when we are ready. Once or twice in the past you have sent as your representative a Mr. Hoyt. If it is your desire that he should go to the foundry again it will be essential to have the dates of delivery that are in the contract waived, as we cannot guarantee them should he have charge of passing the pipe.

We are, yours, WALTER WOOD, *President.*

WASHINGTON, *Aug.* 15*th*, 1887.

Camden Iron Works, 400 Chestnut St., Phila., Pa.

SIRS: In reply to your- of Aug. 4th, I have the honor to inform you that Mr. W. J. Hoyt has been appointed inspector of pipe to be furnished by you. I have never known that Mr. Hoyt neglected his duties or insisted on anything more than was necessary to cause a fulfillment of contract and specifications. His appointment as

inspector will not be considered a sufficient reason for waiving dates of delivery as specified in your contract.

By order of Engineer Commissioner:

T. W. SYMONS,
Capt. of Engineers.

PHILA., *8th Mo.*, 13*th*, 1887.

Col. Wm. Ludlow, water commissioners, Washington, D. C.

DEAR SIR: We have word from our Millville foundry this morning that your pipe will be on their skids on Tuesday. We write this because we have not heard of the arrival of an inspector. If none arrives by the time the pipe are cast, please advise as what you wish done with them, whether we shall keep the pipe waiting for his arrival or have them inspected and tested in our regular way.

We are, yours, WALTER WOOD, *Prst.*

PHILA., *8th Mo.*, 16*th*, 1887.

Capt. T. W. Symons, ass't to Eng. Comm., water works, Washington, D. C.

5

DEAR SIR: Yours of the 18th instant is at hand, speaking of the appointment of Mr. Hoyt as inspector at our foundry.

It would probably have been better for us to have written more fully in our previous letter to you on this subject, for we must have a full understanding before Mr. Hoyt takes up the work. We do not wish to be understood as objecting to Mr. Hoyt as a man, but his examination of castings lacks proper discrimination, and to such an extent as to be unjust. We are not at the present objecting to even such an inspection as this; but as it will entail so great a delay in securing the number of pipe that you desire, you can readily see that the appointment of one who prolongs the time of manufacture in this way makes it essential to change the date of completion. We believe this will make it clear to you that
25 we are not objecting to any inspection because it may be over-exacting, but only that if it is the preference of your department to have such an examination made, time must be given us in which to make the castings. This being the reason of our request, and as we are willing to meet any criticism your department wishes to put upon the pipes, we cannot presume you will hesitate to grant that which it entails. Did we suppose that it would have been otherwise we would have refrained from bidding for the work.

The pipe are now being cast at our Millville foundry, and awaiting your reply, we are,

Very truly yours, WALTER WOOD, *Pres'd't.*

PHILA., *8th Mo.*, 30*th*, 1887.

T. W. Symons, eng., water department, Washington, D. C.

DEAR SIR: We are without advices from you since our correspondence in the matter of the inspector, and it has occurred to us

that perhaps you may have thought we were not casting your pipe. We have, however, kept our gangs on your work so as to complete it within the regular time. The pipe has all been carefully examined, tested, etc., and is ready to go forward to you, if you wish it sent in the absence of your inspector. Iy you desire otherwise, we can utilize it for different orders and remake it when you wish.

Please advise us and oblige,

Yours very truly, CAMDEN IRON WORKS,
Per J. M. H.

WASHINGTON, *Sept. 2nd*, 1887.

Camden Iron Works, 400 Chestnut St., Phila., Pa.

SIRS: Your letter of Aug. 30th is a surprise to me, and I am at a loss to understand it. I wrote you Aug. 15th that Mr. Hoyt was appointed inspector, and he informs me that he has been at foundry daily ready and anxious to inspect pipes under your contract with this city, and has repeatedly urged the prosecution of the work to your sup't at the works, who has stated to Mr. Hoyt that he has no orders to do the Washington work. In the face of these facts your remark that "it is ready to go forward to you, if you wish it sent in the absence of your inspector," &c., is deemed quite remarkable. We are very desirous of having the pipe as soon as possible. Mr. Hoyt is at your foundry to inspect it, and if it is not delivered in accordance with the terms of your contract it would seem that you and you alone are responsible for the delay.

Very respectfully, your obedient servant,

T. W. SYMONS,
Capt. of En.

PHILA., *September 6th*, 1887.

T. W. Symons, eng., water commissioners, Washington, D. C.

DEAR SIR: Yours of September 2nd is before us on the return of the writer from an absence of two or three days.

After ours of the 30th had gone we noticed that the type-
26 writer had the phrase intended to read "in the absence of your inspection" changed by the last word, reading "inspector." We knew of Mr. Hoyt's being in Millville, and hence could not have used the phrase as written.

Your work has been steadily progressing in our foundries since we notified you by letter of our starting, but as no one has taken Mr. Hoyt's place and no arrangement has been made for him to examine the pipe they have not had your inspection, and hence we wrote asking what was your pleasure about forwarding. We have kept them in work, as we wished to complete them as per contract. Please advise us what you wish done.

Let us refer again here to what we said about Mr. Hoyt in our previous letter. We do not object to his examining the pipe, provided it is understood between us that if his examination delays delivery we will not be accountable for such delay. It is not our desire to speak unkindly about him, and what we said in our pre-

vious letter we think sufficient to explain why we made the claim. He is not a proper man for the position.

Awaiting advices of your wishes in the matter, we are,

Yours truly, WALTER WOOD,
Pres't C. I. W.

WASHINGTON, *Sept. 7th*, 1887.

Camden Iron Works, 400 Chestnut St., Phila., Pa.

SIRS: In answer to yours of Sept. 6th, I have the honor to inform you that what this office desires is that the pipe ordered should be inspected and delivered here in accordance with the terms of your contract. Our inspector, Mr. Hoyt, has been at your works daily, duly authorized to make the necessary and proper inspection. He has been directed to make every proper concession consistent with securing good work and materials, and I am not aware of any good and sufficient reason why he should be objected to.

It is desired that it should be distinctly understood that Mr. Hoyt's examination will not be considered as releasing you from accountability for delays in delivery beyond the contract time, unless it is shown that the delay is caused by misconduct or negligence on the part of Mr. Hoyt.

In this connection it may be well to invite your attention to the fact that for three weeks and more he has been at your foundry and has not been permitted to exercise his functions as inspector.

Very respectfully, your ob'd't srvt.,

T. W. SYMONS,
Capt. of Eng.

PHILA., *9th Mo.*, 16*th*, 1887.

Capt. T. W. Symons, water works, Washington, D. C.

DEAR SIR: Yours of the 7th inst. came duly before the writer on his return from an absence, which, together with the con-
27 fusion incident to the celebration now going on in the city, has caused the delay in replying.

We note that you do not wish the pipe already made for you sent to Washington, hence will not do so, and have stopped making them.

It has been unfortunate that you- appointee was a man who has not the entrée of our foundry, and we desire to disclaim here what we fear, from something Mr. Newhall told us on his return, you have understood from our letters, namely, that by what we said we were endeavoring to dictate the appointment of your inspectors. This would be for us as inappropriate and improper as for yourselves to look for us to admit into our shops a man whom we consider unfit. In the matter of inspectors, the real position is, we apprehend, this: that the selection rests with yourselves and the acceptance with us much in the same way as a government sends its accredited agents to other people who, if they have reason for declining such representatives, protect their position by not recognizing them. We do not know that it is worth while to present the grounds in detail of our present action, as we waived them in favor

of Mr. Hoyt in this case because we felt his appointment might have been made for particular reasons, and it has been our endeavor to avoid going into an account of facts that might only lead to contention.

We further desire to disclaim any wish to have the severity of your inspection of our pipe lessened in the slightest degree. Such has not been on our minds and we believe we have so written you.

We note, also, what you say regarding the instructions you have given Mr. Hoyt, and that you state that such delays as come from himself will not count in estimating the time of delivery. This is the gist of our request, as we asked for such extension of time as his appointment might occasion.

There is one point further to be understood in this connection, namely, as to the resumption of work, for if we undertake to remake the pipes as you wish the first delivery cannot be made according to contract. Will this be satisfactory to you? We can arrange to put the pipe in work upon receipt of your answer.

Mr. Newhall reports that you asked him to have us put in writing what we proposed in the matter of the 3″ pipe. The suggestion was made by us not from considerations of the cost of manufacture, but only for mechanical reasons. You will recall the old method of casting pipe on an incline, and that it was given up because the arbor of the core being hollow it had a tendency to float in the molten metal, just as a vessel does on the water. Thus the pipe was thin on one side and thicker on the other. To obviate this, upright casting was adopted, which centered the spindle more perfectly, the arbor having sufficient stiffness from its diameter to withstand the strain caused by the downward flow of the metal, but when we come to the smaller-sized pipe, like 2″, 3″, and 4″ (the last-named size is about the dividing line), the matter is difficult, as these arbors have not sufficient diameter to keep them rigid. For 3″ pipe it has been the custom to have the arbors cast solid,
28 so that while they have no tendency to float in inclined work, yet, being so slender, they are very limber and easily deflected by the flow of the metal. The best pipe of this size, therefore, is made in that character of moulding which permits of the core being steadied at one or more points along its length. This is the method we are using and suggested to yourselves for your consideration, although we make pipes in the same way as your specifications calls for; but the superiority of the other method is so generally acknowledged that we have not this year had a single request for 3″ pipe to be cast differently; hence we felt it our duty to call the matter to your attention.

Awaiting your reply, we are,
Yours very truly,

WALTER WOOD, *President.*

Telegram.

WASHINGTON, *Sept. 28th*, 1887.

Camden Iron Works, 400 Chestnut St., Phila.:

Having failed to furnish the pipe due under your contract on Sept. 25th, there have been ordered from other parties five thousand feet six-inch, six thousand feet four-inch, and five thousand feet three-inch. The Commissioner- desire to know immediately if it is your intention to furnish the remaining pipe contracted for in accordance with the terms of your contract.

SYMONS.

Telegram.

PHILA., *9th Mo.*, 28*th*, 1887.

T. W. Symons, water works, Washington, D. C.:

Your telegram received. We have never declined to make your pipe and are entirely ready to proceed. We have not yet received answer ours sixteenth.

CAMDEN IRON WORKS.

Telegram.

WASHINGTON, *Sept. 28th*, 1887.

Camden Iron Works, 400 Chestnut St., Phila.:

You have failed, not declined, to deliver certain pipe by Sept. 25th, as required by your contract, and the work has been ordered from other establishments. The Commissioners wish to know if you propose to deliver the remainder according to your contract. If not it will be bought in open market and charged to your account as the former part.

SYMONS.

PHILA., 10*th Mo.*, 1*st*, 1887.

Capt. T. W. Symons, water dep't, Washington, D. C.

DEAR SIR: Your telegram of the 23d ult. was delivered after our Mr. Wood had gone out of town, and press of business since his return has prevented an earlier reply.

29 As you say in your dispatch, we have not declined to make the pipe as named in the contract, for in fact we have advised you from time to time that the pipe was in work, and we have made a large tonnage of it.

The only thing preventing the delivery, which is the point at which you say we have failed, has been your instructions to us not to ship what we had made, as it had not been inspected by your Mr. Hoyt; else the pipe would have been in your hands some time since. All the pipe made was carefully and thoroughly examined for defects and tested as called for by the contract. What has been wanted was Mr. Hoyt's supervision, and we do not claim that, lacking this, we were entitled to send you the pipe, but wished by

making it to show our willingness and ability to furnish the castings as contracted for. The position we have taken in the matter of the inspection was not assumed hastily, but only after careful consideration, and (as we told your Mr. Ludlow) we are willing to bear the consequences, should we be proved wrong, for what which we have done.

There is no desire of avoidance of anything on our part. We have, however, sought by the correspondence that has passed between us to find a common ground upon which we could meet the wishes of the department that Mr. Hoyt only should have the supervision of the work, and we thought it had been reached in the last letters that have passed between us.

To reply directly to your query, we would say that we are ready to put your pipe in work and have them in Washington in every way as called for by the contract, except that from the lapse of time it will not be possible for us now to deliver the first portion in the time specified.

Your advise us that you have purchased some pipe, and it therefore becomes necessary for us to say that we cannot admit your right to charge such purchases to our account when we have always stood ready to make and have actually made that which you wanted, the only hindrance to the delivery coming from your selection of Mr. Hoyt, about the choice of whom we wrote you at the beginning when we asked for an inspector to be sent us.

We shall certainly regret if our willingness to go as far as is possible for one respecting his own position and rights shall only lead to further differences of views, and we desire to impress upon you that what we have done has not been from a factious spirit.

If you think that this can be made clear by a personal interview, it will give us pleasure to call upon you.

Awaiting your reply, we are yours very truly,

WALTER WOOD,
Pres'd't C. I. W.

Telegram.

WASHINGTON, *Oct. 4th*, 1887.

R. D. Wood and Co., 400 Chestnut St., Phila.:

Letter of Oct. 1st received. The simple point of which positive assurance is required is, Do you propose to deliver the balance of the pipe under the provisions of your contract, including inspection by the duly authorized inspector? Please answer at once and definitely.

T. *M.* SYMONS.

PHILA., 10*th Mo.*, 5*th*, 1887.

T. W. Symons, water dept., Washington, D. C.

DEAR SIR: Your dispatch of the 4th came duly to hand. We do not see how we can possibly put a reply to your query in a clearer or more categorical way than we did in the 3d clause of the 2nd

page in our letter of the 1st inst. We think when you refer to it again you will agree with us.

The question of the inspection we thought had been thoroughly discussed and a conclusion reached, to which we all assented, as in yours of the 7th ult. and our conversation with Mr. Ludlow when he was in this office.

The writer had hoped to have been able to have gotten off to Washington today or tomorrow, but fears, from the present outlook, it will be impossible to do it at that time, though we would make an especial effort if you so desired it.

Yours truly, WALTER WOOD, *Pres'd't.*

Telegram.

WASHINGTON, *October 6th*, 1887.

Camden Iron Works, 400 Chestnut St., Phila., Pa.:

Yours received. Our inspector, Hoyt, will return to your foundry to inspect pipe in a few days. The Commissioners would like to be assured that this — acceptable and that the work will proceed without delay.

THOS. W. SYMONS,
Ass't to Eng. Comm.

PHILA., 10*th Mo.*, 8*th*, 1887.

T. W. Symons, water works, Washington, D. C.

DEAR SIR: Your telegram of the 6th came duly to hand, and we have instructed the foundry, on the arrival of the inspector, to put the pipe in work. Please let us know what day he will arrive, so that, if possible, we may prepare for his coming.

You have not yet written us what you wish done in the matter of the 3″ pipe, whether you wish us to carry out the suggestion we made or not. We believe we explained that the alternative was prompted not on account of cost of manufacture, but because of mechanical reasons in making a better pipe.

Yours very truly, WALTER WOOD, *Pres'd.*

WASHINGTON, *Oct.* 10*th*, 1887.

Camden Iron Works, 400 Chestnut St., Philadelphia.

GENTLEMEN: Your favor of the 8th inst. is at hand. Our inspector has been telegraphed to and will be at your works
31 very soon, but until I hear from him I cannot tell exact date. I think, however, that you may expect him by Wednesday, the 11th.

The Engineer Comissioner declines at present to consider favorably your proposition for a change in the method of casting 3″ pipe. He would like to have the matter investigated more before authorizing the change.

Very respectfully, T. W. SYMONS,
Capt. of Eng.

PHILA., 10*th* *Mo.*, 11*th*, 1887.

T. W. Symons, water works, Washington, D. C.

DEAR SIR: We have yours of October 10th, saying that you look forward to the inspector reaching us on Wednesday, the 12th.

In the matter of the 3″ pipe, in which you say you would like to have the matter investigated more before authorizing the change, would say that we hold ourselves ready to do anything you suggest in the matter. We will await your reply before taking any steps, and shall be pleased to assist you in the investigation in any way that you wish. We can send a sample of the casting to you at Washington, or we should be pleased to explain it to any one familiar with such work whom you may see fit to send, but if you prefer the matter can be passed entirely by. We only spoke of it because we felt it was proper to call your attention to it.

Awaiting your reply, very truly yours,

WALTER WOOD, *Pres'd't.*

WASHINGTON, *Oct.* 12*th*, 1887.

Camden Iron Works, 400 Chestnut St., Phila.:

I find that it will be impossible for our inspector to be at Millville before Monday morning next, at which time he telegraphs me he will be on hand. Perhaps it will be as well under the circumstances to pass by the question of a change in the method of making the 3″. If I can get away I will come over perhaps next week, and possibly then the change may be authorized.

Very respectfully,

T. W. SYMONS,
Capt. of Eng.

PHILA., 10*th* *Mo.*, 13*th*, 1887.

T. W. Symons, water works, Washington, D. C.

DEAR SIR: Yours of Oct. 10th is duly at hand. We note its contents, and will gladly await your arrival regarding the 3″ pipe.

We further note that the inspector will reach us on Monday.

Yours very truly,

WALTER WOOD, *President.*

WASHINGTON, *Nov.* 1*st*, 1887.

To the Camden Iron Works, 400 Chestnut St., Phila., Pa.

SIRS: I have to call your attention to the fact that this is the last day of your contract time, and as yet no pipe has been received from you. Subtracting the amount of pipe purchased in open market leaves the following amounts to be furnished under your contract: 9,000′ 12″, 5,000′ 6″, 9,000′ 4″, and 6,700′ 3″. It is hoped that this pipe, especially the smaller sizes, will be received very shortly.

32

The Commissioners decline to consider the change proposed in method of making 3″ pipe, so it will be required to be made in accordance with the contract specifications.

Very respectfully, yours, &c.,

T. W. SYMONS,
Capt. of Eng.

PHILA., 11*th Mo.*, 3*d*, 1887.

T. W. Symons, water supply, Washington, D. C.

DEAR SIR: We have yours of Nov. 1st duly at hand, and note that you have reached a decision regarding the 3″ pipe, namely, to have it cast as originally desired. We will therefore have it taken in hand at once and proceeded with.

The other points in your letter have been covered by our preceding correspondence.

Very truly yours, WALTER WOOD, *President.*

Telegram.

WASHINGTON, *Nov.* 30*th*, 1887.

Camden Iron Works, 400 Chestnut St., Phila, Pa.:

Will you consent to cancellation of order for remaining 12″ pipe?

T. W. SYMONS.

Telegram.

PHILA., 11*th Mo.*, 30*th*, 1887.

T. W. Symons, water dep't, Washington, D. C.:

Shall be glad to accommodate Government, if possible; but let us have further details.

R. D. WOOD AND CO.

PHILA., 11*th Mo.*, 30*th*, 1887.

T. W. Symons, eng., water works, Washington, D. C.

DEAR SIR: Your dispatch of this morning is at hand, asking if we will consent to the cancellation of the remaining 12″ pipes we have not yet made for you. It is always our rule to oblige our customers so far as we can in such matters. In the last two or three weeks the price of pipe, like everything else in the iron trade, has decreased largely, and hence there would be a considerable loss to us in complying with your request. Of this, however, we will make no account and will cancel the order for the remaining 12″ yet unmade, it being understood that all the pipes we have cast shall be taken and paid for at the regular contract price, without any deduction.

We say this not because we know of any charges you have
33 against us, but in one of your dispatches of a month ago or so you mentioned something of that kind, and in our assuming the disadvantage of the cancelling of the 12″ pipe let it be understood that the disadvantage of anything early in the fall is to be borne by the department.

Yours very truly, WALTER WOOD, *President*,
Per M. H.

(Nov. 30.)*

WASHINGTON, ——, 1887.

Camden Iron Works, 400 Chestnut St., Phila.

GENTLEMEN: Your telegram received. Our appropriation for the water dep't *are* in such a state that we could not lay the 12″ pipe if it was received. That being the case, I would prefer not to expend money for the pipe until next appropriation by Congress is available. I have not laid the matter before the Commissioners, as I would like your assurance of your willingness to consider the order for the remainder of the 12″ pipe revoked, if such willingness on your part exists.

The question of available funds is the only and sole question involved.

An early reply would very much oblige me.

Very respectfully, your obdt. srvt.,

T. W. SYMONS,
Capt. of Eng.

PHILA., 12*th Mo.*, 1*st*, 1887.

T. W. Symons, eng., water works, Washington, D. C.

DEAR SIR: We have yours of blank date this morning, and the suggestion you make of the shortness of the appropriation is one we often have to face. We can readily arrange to accommodate you by letting the account be paid out of next year's appropriation, sending you the pipe to be put to such use in the meanwhile as you desire.

It always gives us pleasure to accommodate our friends in such thing as this, and as soon as we have word from you will stop casting any more pipes, as per our letter of yesterday, if such is your wish. You can readily see, however, that those which are made, being cast according to your designs, we would desire to have taken off our hands, as almost all engineers have particular wishes regarding drawings, e-c.

Yours very truly, WALTER WOOD, *President.*

Telegram.

WASHINGTON, 12*th Mo.*, 2*nd*, 1887.

Camden Iron Works, 400 Chestnut St., Phila.:

Only pipe now manufactured will be received under your
34 contract all further work on pipe for this city to cease letter by mail by order Engineer Commissioner.

T. W. SYMONS.

[* In pencil in copy.]

WASHINGTON, *Dec. 2nd*, 1887.

To the Camden Iron Works, 400 Chestnut St., Phila.:

In furtherance of my telegram of this date, I have the honor to inform you that the Engineer Commissioner orders that only the pipe now manufactured under your contract be received, and that the order for the pipe designated in my letter of Nov. 1st, 1887, in so much as it refers to the pipe yet unmade, be cancelled. You are therefore requested to cease work on pipe for Washington and to send on and deliver the pipe which is now made and accepted by our inspector.

Very respectfully, T. W. SYMONS,
Capt. of Eng.

PHILA., *12th Mo., 5th*, 1887.

T. W. Symons, eng., water works, Washington, D. C.

DEAR SIR: We have stopped casting your pipe as per your request of December 2nd.

Yours very truly, WALTER WOOD, *President.*

And thereupon the witness further testified, upon direct examination, that a copy of the contract was not returned by the District Commissioners as requested in plaintiff's letter of July 21, nor was it received by the plaintiff until the 4th day of August, though whether it had come by mail or whether the plaintiff sent a messenger to Washington for it the witness could not recall; but when received on the 4th day of August it was not signed by William B. Webb, one of the Commissioners of the District, a fact which witness did not consider at the time as being of any importance.

The copy of the contract so received by the plaintiff was thereupon offered in evidence. It was identical with that produced by the witness Tindall, except that it did not have the signature of William B. Webb.

That immediately upon receipt of this contract the plaintiff company made ready to cast the pipe required by it. A large quantity was manufactured during the month of August and was ready for inspection; but after the correspondence about the unfitness of Hoyt to act as inspector and after the receipt of the letter from Captain Symons, of date September 7, 1887, insisting that Hoyt should inspect and pass upon the pipe, which the plaintiff refused to permit, the plaintiff stopped work on the Washington pipe and sold to other parties what had already been manufactured. The witness stated that he had known Hoyt before, and that, in his opinion, as a practical man, it would not have been possible if Hoyt was sent as inspector for the plaintiff corporation to furnish the pipe required by the contract within the times therein lim-
35 ited. This because Hoyt rejected as defective so many pipes that were entirely in accordance with the specifications, except for a little thickness at some points in the shell of the pipe which in no way affected their strength or usefulness.

That somewhere between the 10th and 15th day of September, 1887, Colonel Ludlow, the then Engineer Commissioner of the District of Columbia, came to the plaintiff's office, in Philadelphia, without any request from the plaintiff that he do so, and discussed the whole matter with the witness. Though Colonel Ludlow did not then enter into any formal agreement, he gave the witness to understand that Hoyt would be instructed to be more careful in his rejections of pipe, and to be fair and judicious in his manner of conducting the examination. The witness then told Colonel Ludlow that the plaintiff corporation could not agree to again begin work on the Washington pipe unless it was understood that no penalties would be imposed as for delay in delivering.

That to this Colonel Ludlow replied that no injustice would be done the plaintiff, and led the witness to believe that penalties for delay would be waived; otherwise the plaintiff would not have done anything further under the contract. At the conclusion of this interview the witness told Colonel Ludlow to order Hoyt's immediate return to the Millville foundry, and that on his arrival the work would at once be resumed. That Hoyt did not return until the 17th day of October following. In the meantime there was a further delay of some thirty-three days through no fault of the plaintiff.

That there was delay in commencing the work on the 3″ pipe because of the failure of the Engineer Commissioner to decide how this size should be cast, and whether in strict accordance with the specifications of the contract or as suggested by the witness in the correspondence.

Though this matter was frequently referred to in the letters back and forth, no decision was reached till November first, when the Engineer Commissioner decided that no change should be made in the method of casting as called for by the specifications. In the meantime no work was or could be done on pipe of this size.

That Hoyt finally arrived at Millville on the 17th of October, and immediately work was begun on the Washington pipe. But Hoyt was still incompetent to inspect pipe fairly, for out of a total of 2,726 lengths of pipe inspected he rejected 704, of which 169 only did not come up to specifications. The rest, 435 in number, were put in stock and sold to other customers at full contract prices.

That on the 30th day of November, when Captain Symons requested in his letter that no more pipe be cast under plaintiff's contract with the defendant, there remained to be cast about 340,000 pounds of pipe, on which the plaintiff's profits at contract prices would have been about $1,300. The plaintiff was willing to lose this profit in order to accommodate the District officials.

That after the plaintiff's letter of November 30, assenting
36 to a cancellation of the contract in so far as it related to pipe not then manufactured, provided that all pipe then cast should be taken and paid for at the regular contract prices without any deduction, and Captain Symons' reply thereto, directing the plaintiff to send on and deliver the pipe then manufactured and

accepted by Hoyt, the value of the pipe actually shipped to and accepted by the District at contract rates was $11,404.09. Had witness supposed this pipe would not be paid for at contract rates, or that fines or penalties would be charged against it, none of it would have been sent.

That after receiving from Captain Symons his letter of November 30, saying that the pipe could not be laid until after a further appropriation by Congress, the plaintiff did not make any particular haste to deliver what had then been cast and inspected. It was sent as schooners could be conveniently chartered. One consignment shipped by the schooner Morton from the Millville foundry on January 12, 1888, did not arrive until the 27th of February. The schooner was paid for the trip and not for the time consumed in making it.

That under date March 28, 1888, the plaintiff received the account from the auditor of the District and a letter under date the 30th of the same month, enclosing two checks, one for $2,369.29 and another for $2,922.42. This letter did not indicate whether or not these checks were in full. But the plaintiff received shortly thereafter a statement of account showing practically that fines and penalties as for delay had been charged to an amount about equal to all the pipe shipped after the 1st day of December. That witness protested against this way of settling the account and went to Washington two or three times with regard to it. The treasurer of the company also went several times during the next year or two to Washington in an effort to secure a just settlement of the account. On one occasion the witness was referred by the then Commissioners to Colonel Ludlow, who had ceased to be a District Commissioner and was engaged on light-house duty at the city of Detroit. The witness went twice to Detroit to see Colonel Ludlow for the purpose, if possible, of having him recommend a readjustment of the account. On one occasion only did the witness see Colonel Ludlow and then he refused to make an- recommendation whatever with regard to the matter.

During this period also the witness wrote two letters to the Commissioners, dated, respectively, February 5, 1889, and November 10, 1892, in words and figures following:

FEB. 9, 1889.

Captain James L. Lusk.

DEAR SIR: In accordance with our conversation of a few days ago we write about the contract for cast-iron pipe entered into with the District of Columbia 29th June, 1887, from the final payment of which there was a deduction of $11,059.16. This deduction was made on account of certain delays in deliveries and expenses attending the inspection. These were caused by some question that arose regarding appointment of inspector, whom, from our previous
37 experience, we felt was antagonistic to us and exercised his power without proper consideration.

The request we made of Col. Ludlow was that if he desired Mr. Hoyt (who was the man sent us) to act as inspector that additional

time to complete the contract be given us. We felt this to be but a reasonable request, and when making it disclaimed all desire to shirk any rigidity of inspection, even should we consider such to be overexacting, wishing only to avoid a double loss of replacing work and having demurrage charged for the time so consumed. We regretted that this suggestion gave rise to a correspondence as to whether or not the manufacturer had a right, for any cause, to object to an inspector, and which point, from the first, we had endeavored to avoid by only asking for an additional time.

Col. Ludlow when attending the Centennial celebration in Philadelphia called on us, and while the position taken by him was that he could not formally waive the terms of the contract, yet, as everything was most carefully talked over between us, we considered an understanding was reached, and hence were surprised when the account was sent us with the deductions made from it.

We believe that this briefly covers the status of the matter, except perhaps it may be well to refer to the general character of cast-iron-pipe specifications in which the requirements are laid down with such rigidness that it is an impossibility to turn out practicable work in view of this fact, and the acceptance or rejection of the pipes is a matter of judgment and preference of the party passing upon them.

In going over the grounds above we have not taken up the details of the question, preferring, when you are ready, to go into them and to do so personally with you instead of confusing these general statements with what would necessarily occupy much space.

Awaiting your reply, I am,
Yours truly, WALTER WOOD, *President.*

P. S.—Enclosed we hand you our copy of your account, showing the deductions.

Copy.

NOVEMBER 10, 1892.

To the Commissioners of District of Columbia, Washington, D. C.

GENTLEMEN: We have on our books an open account, amounting to $11,059.16, against the District, remaining over from a contract which we made with the then Commissioners on the 29th of June, 1887, for furnishing cast-iron water pipe, and which balance is largely composed of certain deductions made on account of delays in delivery, which delays were caused by some questions that arose regarding the inspection of the pipes by a person who, we felt, from some previous experience which we had with him, had exercised his power arbitrarily and without proper consideration.

Before commencing to cast the pipes we requested the Engineer Commissioner to—if he desired Mr. Hoyt (who was the party
38 who had before inspected at our foundry) to act as inspector in this instance—grant us additional time to complete the contract, disclaiming all desire to shirk any rigidity of inspection, even should we consider such to be overexacting, which

request we felt to be but a reasonable one, as we desired only to avoid the double loss of replacing castings that might be rejected by the inspector and the penalty incident to the time consumed in doing so.

To our regret, this suggestion gave rise to correspondence as to whether or not a manufacturer had a right for any cause to object to an inspector, which question we had endeavored to avoid by only asking for additional time for the reasons above referred to.

Col. Ludlow, the then Engineer Commissioner, being in Philadelphia about this time, called on us, and all the points at issue were very fully talked over between us; and while the position taken by him was that he could not formally waive any of the terms of the contract, an understanding was reached satisfactory to both of us, and hence we were greatly surprised when the account was sent to us with the deductions made from it.

We beg to particularly call to your attention the amount of the deductions, which are, in our opinion, excessive and very much greater than any loss which could possibly have fallen on the District by reason of its non-receipt of the pipes at the specified times, the contract providing that one-half should be delivered by the 25th of September and the balance by the 10th of November of the year in which the contract was made, whereas shipments were commenced on the 8th of November, 1887, and completed on the 14th of January in the following year, an average difference of time of less than two months, making it difficult, not to say impossible, for us to imagine that a loss to the extent of the amount charged against us could possibly fall on the District by reason of so short a delay, and we therefore ask that the matter be reconsidered and a settlement made.

We desire further to say that before our deliveries were complete the Commissioners, finding that their appropriation was nearly exhausted, asked us whether we would be willing to stop making the pipes and to cancel the balance of the contract; to which request, although the dull season was on us, orders being very desirable and prices materially lower than when we entered into the contract, we acceded, making it, however, a provise in the letter which we wrote accepting such cancellation that our full account should be paid without any deduction; whereupon the contract was cancelled and we stopped making the pipes.

We believe this fully states our case, except that it may perhaps be well to refer to the general character of the specifications for cast-iron pipe, which seldom have in them such rigid requirements as those which form a part of the contract we refer to, which is evidenced by the fact that none which have been issued by the District since the above-named year have contained such severe requirements, particularly in the matter of delivery, we having executed several contracts since that time to the satisfaction of both parties.

39 In going over the matter, as we have in this communication, we have not taken up the details of the account, preferring, when you are ready, to go into them personally with you and

explain many points that can hardly be gone over by correspondence. We desire, however, to get it settled and an interview at which all the points can be thoroughly gone into.

Yours very truly, CAMDEN IRON WORKS.

Dictated by Wm. E. Newhall, treas.

In reply to the last of these letters the plaintiff received a letter from the District Commissioners' office as follows:

WASHINGTON, *Nov.* 21, 1892.

Mr. Wm. E. Newhall, Camden iron works, Camden, N. J.

DEAR SIR: Relative to your claim for balance alleged to be due you on account of contract of June 29, 1887, I am directed to inform you that the account referred to was settled more than four years ago, and that your only recourse, if you desire relief, is to apply to Congress therefor.

Respectfully, JAMES CAMPBELL,
Acting Secretary.

That this was the first time the plaintiff was informed that the Commissioners would not or could not readjust the account. That thereupon, and in accordance with the suggestion of the Commissioners last referred to, the plaintiff procured a bill to be introduced in Congress authorizing payment of the balance due for pipe furnished under the contract. This was done on the 3d day of February, 1893, by the member of Congress from the Camden district of New Jersey. Neither the witness nor any other officer of the plaintiff corporation had had any previous experience in legislative matters, but they all assumed that the bill was mere matter of routine; that it would be referred to the District Commissioners and its enactment into law recommended by them. After waiting a year, during which no action was taken by Congress on the bill so introduced, the plaintiff gave up all efforts to secure a settlement of the account out of court, and counsel was retained to bring suit. This was done during the spring or early summer of the year 1894. After this the matter was entrusted entirely to the lawyer so retained.

And thereupon the plaintiff further gave evidence by one CHRISTOPHER MILLER, who testified, upon direct examination, that he had been an inspector at the plaintiff's Millville foundry for twenty years and upwards, and was acquainted with William J. Hoyt, having met him, while inspector for the Washington work at the Millville foundry, in 1887; that witness was present with Hoyt when pipe made for the defendant was inspected at the Millville foundry, and that a great deal of the pipe rejected by Hoyt was put in stock and sold to other customers at full contract rates. And
40 thereupon counsel for the plaintiff asked the witness Miller the following question:

Q. Were any of the pipe that were thrown out by him good?

A. To which the defendant, by its counsel, interposed and objected upon the ground that under the contract, Hoyt being accepted by the plaintiff as inspector, his decision was final between the parties, and evidence was not admissible to show an error of judgment on his part; but the court overruled the objection and permitted the said question to be asked and the answer thereto to be given to the jury, and thereupon the witness answered as follows:

There were plenty of them. Some of the pipe rejected had only little blisters on the side, but that did not interfere with the usefulness of the pipe at all. Some of them I could not find anything the matter with. If the pipe had not been good after their rejection I would not have taken them back in stock as was done.

And thereupon the defendant, by its counsel, duly excepted to the said ruling of the court in permitting the said question to be answered, and said exception was noted at the time upon the minutes of the court.

And thereupon the witness further gave evidence, upon direct examination, tending to show that the pipe was inspected by measurement and hydraulic pressure, and when the pipe was found to be good, after rejection by Hoyt, they were replaced in stock; that about 400 pipes were rejected by Hoyt which in the opinion of the witness were perfectly good and should have been accepted, and that of the whole lot rejected by him only 140, in the opinion of the witness, were actually bad; that the good pipe which were rejected were afterwards sold to different customers in open market, and no complaints were ever received that they were bad.

And thereupon the witness further gave evidence by one JAMES F. FANNING, who testified, upon direct examination, that he was the shipping clerk for the plaintiff corporation at Millville foundry, and had been in the employ of the Millville foundry for twenty-six years; that the plaintiff's foundry possessed first-class facilities in 1887 for casting pipe such as were needed in the contract with the District; that he knew William J. Hoyt, the District inspector, having met him in Millville in August, 1887; that no pipes were submitted to Hoyt's inspection in that month, because he was so rigid and unreasonable that it was next to impossible to cast a pipe that would come up to his requirements. In the opinion of the witness he was an incompetent man for such inspection; that after Hoyt left in August he did not return again to Millville until the 17th of October, 1887.

And thereupon counsel for the plaintiff asked the witness the following question:

Now, will you describe the process of getting ready to cast pipe for a given order down at the Millville foundry?

To which counsel for the defendant interposed and objected, on the ground that under the contract the plaintiff had agreed
41 to furnish the pipe within a given time, and it is immaterial to show that a longer time would be required because of the method in which the plaintiff cast its pipe; but the court overruled the objection and permitted the said question to be asked and the

answer thereto to be given to the jury, and thereupon the said witness answered the said question as follows:

I got the Washington order August 5, 1887, and the sizes were 3, 4, 6, and 12 inch pipe. We were ordered to prepare head patterns according to the specifications sent by the defendant's engineer department for the different sizes. When they sent the specifications, blue prints, and drawings we started to make the head patterns. Forming the measurements in the drawings, we made the three-inch pipe practically at a guess. Three head patterns for the three-inch pipe, three head patterns for the four-inch pipe, and six head patterns for the six-inch pipe, and two head patterns for the twelve-inch pipe—in all fourteen head patterns to be made. We could have gotten those ready in from ten days to two weeks or shorter than that sometimes. It takes about ten days to get them ready. Then we started to make pipe from those head patterns.

And thereupon the defendant, by its counsel, duly excepted to the said ruling of the court in permitting the said question to be answered, and said exception was noted at the time upon the minutes of the court.

And thereupon the witness further gave evidence that it would have taken about forty-three days to complete the Washington order if the entire force had been put to work on that one order, irrespective of other work.

Many of the pipe rejected by the inspector, Hoyt, were fairly up to the specifications of the contract, and those which our own inspector, Miller, said were good were put back in stock and sold to other customers at full market rates. We first received at Millville orders to go ahead with the Washington work from our headquarters in Philadelphia on the morning of August 5, and immediately set about preparing to cast the pipe. A large quantity of pipe, perhaps one-third of the entire order, was cast during the months of August and September, but when the work was suspended on the Washington contract the pipe so cast was sold to other customers of the plaintiff in filling contracts. After it was determined to resume work, about the middle of September, we could have begun any day that Inspector Hoyt might arrive. He came, as before stated, on the 17th of October, and we quit work on the Washington order on the 1st of December. During December, as there did not seem to be any hurry about sending on the pipe, they were sent as we could charter schooners for the purpose. The schooners so chartered were paid by the trip.

And thereupon counsel for the plaintiff announced that they had no more testimony to offer.

42 After the foregoing proceedings, which are hereby made a part hereof, the defendant, to maintain the issues on its part joined, offered and gave evidence as follows:

By THOMAS W. SYMONS, who testified that he was assistant to the Engineer Commissioner and in charge of the water works and sewerage in the year 1887; that he wrote the letters which have been offered in evidence; that he was acquainted with Mr. Wood,

the president of the Camden iron works, and with Mr. Hoyt, the inspector of pipes intended for water-main service; that there was a great deal of building going on in the District in that year and a great need for the pipe called for under the contract with the Camden iron works; that he visited Camden during the time of the contract and saw the representative of the company; that he went there to see how the work was getting along and to see what was the real objection to Hoyt as an inspector; that Hoyt explained why pipe had been rejected by him; that representatives of the company were present whom he did not know, though he did not think Mr. Wood was among them; that this visit was made in the fall of 1887; that the reasons for delay in delivering the pipe, as far as he knew, appeared in the correspondence; that the settlement made was with the knowledge and approval of the witness and under his direction at the time it was made; that Colonel Ludlow, the then Engineer Commissioner, is now in Havana.

On cross-examination the witness further testified, in response to questions by the plaintiff's attorney, that he was assistant to Colonel Ludlow, the Engineer Commissioner, in 1887, and had charge of the details relating to the pipe castings under the contract offered in evidence; that he did not know, when he wrote the letter of July 9, that the contract had not been signed by the District Commissioners, and did not consider it material; that he considered it in accordance with the contract to charge against the plaintiff fines for the delay occasioned by the failure of Hoyt to arrive at the Millville foundry after he had been requested so to do; that when he requested the plaintiff, in reply to their letter of November 30, assenting to a cancellation of the contract so far as it related to pipes not cast, that all pipes cast should be taken and paid for at contract rates, and to send on and deliver pipe then cast, he did not intend to confiscate by way of fines all pipes that might be sent thereafter; that he did not at that time give any consideration to the question of fines and penalties, which was a matter to be adjusted after the contract was finished; that his intentions related principally to getting the pipe for the benefit of the city; that when he stated in his letter of November 30 that the only question involved was the one of available funds he did not have "up his sleeve" the question about fines which developed later and after the pipe were received; that he did not consider that the contractors had any reasonable or proper excuse for failure to deliver the pipe on time; that, in his opinion, a reasonable excuse for the failure would be that the foundry burned down or the pits burned up.

On redirect examination, in response to questions propounded by the counsel for the defendant, the witness further testified that he had heard the testimony of the witness Fanning about the
43 rejection of pipes by Inspector Hoyt, and that, in his opinion, the proportion of pipes rejected by Hoyt was not very large; that there was very little difference in the method of casting commercial pipe, though nearly all water works have a little different drawing on the bell head, though very little; that the witness had examined some of the pipes rejected by Hoyt and found that they

were eccentric and some of them were crooked on the small end, but most of his rejections were due to the eccentricities of the pipes.

On further cross-examination, in response to questions propounded by the counsel for the plaintiff, the witness testified that he went to Millville foundry, on the occasion of the visit he had mentioned, in the morning and back again at night; that he was not quite sure he went into the Millville office and did not remember whether or not he had seen the president of the company, Mr. Wood. He could not remember whether or not this visit was before or after the first of November, though he thought it was shortly after he ordered the work on the Washington contract; that he did not remember whether or not any of the pipes had then been shipped to the District; that the pipes rejected by Hoyt as being eccentric were at the works, though he did not recollect whether they were on skids or in a pile; that he determined about the eccentricities of pipes by rolling them; that he saw them rolled or possibly rolled them himself; that he did not remember how many pipes he so rejected and could not say whether or not they were not the pipe afterwards rejected and broken up by Mr. Miller, the inspector of the plaintiff company; that he did not remember having notified any official of the plaintiff company that he intended to make this visit.

On being recalled, the witness further testified, in response to questions propounded by counsel for the defendant, that a lot of pipes were purchased by the District outside of the contract, though he could not remember how many.

The defendant, further to maintain the issues on its part joined, gave evidence by HENRY F. HAYDEN tending to show that in pursuance of duly published advertisements in 1887 the plaintiff company, through its proper officers, made proposals for furnishing cast-iron water pipe to the District government; that in due course of time the said plaintiff was awarded the contract given in evidence, it being the lowest and only bidder; that many people in the District were suffering for water, and the failure of the plaintiffs to deliver the pipe contracted for was a matter of great annoyance and inconvenience to the people of the District, as well as a source of great expense to them; that so decided was the necessity for the pipe contracted for that it was deemed proper to purchase a quantity of such pipe wherever it could be found in open market and charge the excess of cost over the contract price to the plaintiff; that this was done, and pipe was purchased from Jackson and Woodin, of Berwick, Pennsylvania, and from the Sayre Pipe Foundry Company of Sayre, Pennsylvania, and the plaintiff was duly informed of this action on the part of the defendant;
44 that the plaintiff finally concluded to go on with the making of the pipe and to accept Mr. Hoyt as inspector, and they did make the pipe under his direction and it was delivered to the defendant.

Thereupon the counsel for the respective parties presented certain requests for instructions. In passing upon these the court said:

COURT: There are certain questions raised by the prayers for instructions on both sides that will have to be determined first and then I can pass specifically upon the several instructions themselves, and either grant or reject them as may be required by the determination of these questions. The first of these is whether this contract, which undoubtedly is a contract of the District of Columbia, conceded to be such by the defendant itself, is a sealed instrument, obligatory upon the District of Columbia as a sealed instrument, and therefore whether this action which is based upon it as a specialty, upon a covenant contained in it, can be maintained. If it is not a specialty the action should have been assumpsit and not covenant. This question, I understand, was determined by Justice Cole upon demurrer, and therefore it would seem to me that it has been concluded so far as the court of first instance is concerned. If I had determined the demurrer in the first instance, I would be perfectly free to overrule myself, if the conclusion were reached that my first decision was erroneous, but I cannot allow myself the same freedom of action with reference to the decision of one of my brethren who held this court at a former term. It does not appear to me, however, that there is any real difficulty over this question. Suppose you take as an illustrative decision the case of State *vs.* Macauley, 15 California, 456. This was a contract entered into be the board of State prison commissioners, acting in behalf of the State of California.

The instrument declares itself to be "An indenture made and entered into this twenty-sixth day of March, A. D. one thousand eight hundred and fifty-six, between the State of California, by Robert M. Anderson, lieutenant governor; G. W. Whitman, controller of the State of California, and Henry Bates, treasurer of the State of California, constituting the board of State prison commissioners created by an act of the legislature of said State of California entitled 'An act creating a board of State prison commissioners and defining their duties,' approved the twenty-first day of March, A. D. 1856, party of the first part, and James M. Estill, party of the second part."

The attestation clause is: "In witness whereof Robert M. Anderson, lieutenant governor of the State of California; George W. Whitman, comptroller of the State of California, and Henry Bates, treasurer of the State of California, constituting the board of State prison commissioners, and the said James M. Estill, party of the second part, have hereunto set their hands and seals the day and year first above written."

And then follows the several names constituting the board of State prison commissioners, with a scroll seal opposite each name.

45 The State of California was sued and sought to be held responsible under the contract as the deed of the State, and the objection made was that the instrument not bearing the State

seal was not its deed, but the deed of the individuals who signed it and affixed their individual seals to it. Justice Field, delivering the opinion of the court, said:

"The objection is applicable only to contracts of a private character, made in cases of a mere private agency. A different rule exists in reference to contracts executed by agents of the Government. 'In such cases,' says Mr. Justice Story, in speaking of the liability of public agents, 'the presumption prevails that the parties contract, not personally, but merely officially, within the sphere of their appropriate duties. Thus a charter-party, sealed and executed by a public officer in his own name, but describing himself as acting in behalf of the King or government for purposes connected with the public service, has been held not to bind him personally, but to be merely obligatory upon the government.'"

The justice gives other illustrations, and then, referring to the case of Stinchfield *v.* Little, in 1 Greenleaf, page 231, adds:

"Where a contract is entered into, or a deed executed in behalf of the government, by a duly authorized public agent, and the fact so appears, notwithstanding the agent may have affixed his own name and seal, it is the contract or deed of the government, who alone is responsible, and not of the agent."

The only other case that I will refer to upon that point is Sheets *vs.* Selden, 2 Wallace, 177, where a contract was entered into in the same manner by officers by their names and seals, but it bore the seal of the State—the State of Indiana. The same justice, delivering the opinion of the court in that case, said:

"In the execution of this instrument the governor and auditor acted officially and not personally, and in our judgment the deed was sufficient to pass the title of the State they represented. And it may be stated generally that when a deed is executed or a contract is made on behalf of a State by a public officer duly authorized, and this fact appears upon the face of the instrument, it is the deed or contract of the State, notwithstanding that the officer may be described as one of the parties and may have affixed his individual name and seal. In such cases the State alone is bound by the deed or contract, and can alone claim its benefits."

Now, this contract appears to be the filling out of a printed form provided by the District of Columbia to be used in all contracts of this nature. The attestation clause is printed, and the body of the contract is printed. The only filling in is in the subject-matter of the contract, and the name of the party with whom the contract is made by the District of Columbia. It purports to be between the District of Columbia, of the first part, that being printed, and the Camden Iron Works, by Walter Wood, its president, of the second part, and concludes with the clause: "In witness whereof, the undersigned, William B. Webb, Samuel E. Wheatley, and William Ludlow, Commissioners of the District of Columbia, appointed under
the act of Congress entitled 'An act providing a permanent
46 form of government for the District of Columbia,' approved
June 11, 1878, and the party of the second part to these

presents have hereunto set their hands and seals the day and year first above written.

(Signed) WILLIAM B. WEBB, [L. S.]
(Signed) S. E. WHEATLEY, [L. S.]
(Signed) WILLIAM LUDLOW, [L. S.]
Commissioners of the District of Columbia.
(Signed) WALTER WOOD,
Pres't Camden Iron Works.

[Corporate Seal of Camden Iron Works.]

Signed and sealed in the presence of—
(Signed) E. H. DIEFFENBACH,
As to W. Wood, pres't."

It contemplates execution precisely in the manner that this contract has been executed. It purports to be the contract of the District of Columbia by its Commissioners. It purports to be an instrument under seal, providing for its execution by the District of Columbia through its Commissioners, with their seals, and by the other party to the contract, with its seal.

Now, if it is possible for the District Commissioners to bind the District of Columbia by an instrument under seal, the seal being the individual seal of the Commissioners of the District of Columbia, it seems to me that that has been done. If they can execute an instrument under seal without affixing the corporate seal of the District of Columbia, they have done it. It cannot be forgotten or overlooked that the District of Columbia, which had been created a body corporate for municipal purposes by the act of Feb. 21, 1871, which had been provided with the machinery of government for municipal purposes, with a governor, a Board of Public Works, and a Legislative Assembly, which had been authorized to have a seal (and that is all that is said in this act about a seal) by the act of June 11, 1878, had its whole scheme of government changed. The office of governor, the officers of the Board of Public Works, and the Legislative Assembly had been abolished in 1874 and certain temporary Commissioners had been provided for at the same time. The present existing government organized under the act of June 11, 1878, and by that act all the executive power was conferred upon the three Commissioners whose officers were thereby created. Under that statute, acting officially, they are the District of Columbia. We have a Legislative Assembly, to be sure, but the Legislative Assembly is the Congress of the United States. In that statute the United States assumed to pay one-half of the expenses of the government of the District of Columbia. It assumed the control and direction of the entire municipal governmental functions through its officers, for these Commissioners are appointed by the President of the United States and their appointment is subject to the approval of the Senate. The United States, therefore, is the government of the District of Columbia
47 through its agents, the Commissioners of the District of Columbia.

Met. R. R. *v.* D. C., 132 U. S., 9.

It has been repeatedly held that the acts of the Commissioners of the District of Columbia are the acts of the District of Columbia; that as a municipal corporation it is bound by their contractual acts or by their negligences or defaults just as it was held with reference to the Board of Public Works in Barnes *vs.* D. C., 91 U. S., 540. It was contended there that the Board of Public Works, being appointed by the President and under the law invested with the entire control of the streets of the District and charged with their regulation and repair, was independent of the municipality, the District of Columbia, and that the District of Columbia could not be held responsible for their torts, but the Supreme Court held otherwise. Now, I am of opinion that the Commissioners of the District of Columbia had power to bind the District of Columbia by an act such as is evidenced by this contract; that if they saw fit they could adopt as the seal of the District of Columbia any device that pleased their fancy; that for the purpose of binding the District of Columbia by a sealed instrument of this character they could for the time being adopt their own seals, making it a sealed instrument in that way. In the execution of this contract they acted as public officers. And it appears to me to be clear that the act of the Commissioners of the District of Columbia in the execution of this contract in affixing their individual seals was clearly not their act as individuals, but it was their act as the executive officers of the District of Columbia, and the seal adopted by them for this purpose is the seal of the District of Columbia. The evidence indicates that a seal was adopted by the District of Columbia during the time of the existence of the Legislative Assembly, the Board of Public Works, and the other offices of the former government, but that that seal had performed no function for many years, remaining in disuse and seclusion until some time after the execution of this contract, when it was resurrected from its place of deposit and put in charge of Dr. Tindall, secretary of the Board of Commissioners. There does not appear, however, to have been any distinct act of the Commissioners adopting this old seal of the District of Columbia as its present seal. While I shall feel bound by the decision of Justice Cole upon the question whether this was a sealed instrument of the District of Columbia or not, I should have no difficulty of my own that it is, and such is my own conclusion.

Now, as to the claim that this contract contemplates performance by a certain limited time, that the iron water pipe contracted for was to be delivered by certain dates, and that inasmuch as the pipe was not delivered by the dates specified in the contract, that an action of covenant cannot be maintained; that the plaintiff is driven to an action of assumpsit for work and labor done, for goods sold and delivered, and perhaps to the recovery of a *quantum meruit* instead of the contract price. However, that question need
48 not be gone into; that claim might be sustained if it appeared that time was of the essence of the contract. An illustration given by Justice Miller in the case of Phillips *vs.* Seymour, 91 U. S., where a man agreed to buy a horse on Monday, if brought to him and delivered on that day, an offer to deliver him

on Tuesday would not be within the terms of the contract; but this is not the nature of the contract that we are considering. The contract provides that one-half of the pipe contracted for shall be delivered by September 25th and the remainder on or before November 10th, 1887; but that is not all. It contemplates the possibility and the probability that it shall not be delivered half by September 25th and the balance by November 10th, for it provides that "in case the deliveries are not made as above specified there will be deducted from the contract price as herein specified one per cent. for all delinquent articles and for each and every week day that they remain delinquent." Why cannot the party of the second part under this contract, the plaintiff in this action, sue upon this contract subject to its penalties? The contract itself contemplates that the goods will not be delivered at the time contracted for, provides for that contingency by prescribing a penalty or a certain measure for ascertaining damages and liquidating them in that way. Now, it appears that the pipe contracted for was eventually delivered, and all that has been sued for was accepted. So that there can be no question as to the right of the plaintiff to sue upon this contract. It has not lost its right of action by reason of the fact that the pipe was not delivered at the time specified. The District of Columbia has recognized the validity of the contract and it has recognized the right of the plaintiff to claim compensation less damages, for it has deducted or set off liquidated damages against the price of the pipe and reduced the compensation or contract price to which the plaintiff would otherwise be entitled. The District of Columbia, by its officers, has claimed that this pipe, delivered after the date specified, was delivered in compliance with the terms of the contract, for it insists upon the penalties that are prescribed by the contract. Now, what are these penalties? Are they penalties or are they liquidated damages? The first provision is that—

"In case the deliveries are not made as above specified there will be deducted from the contract prices, as herein specified, one per cent. of the contract price for all delinquent articles for each and every week day that they remain delinquent."

Now, suppose this contract to be for the delivery of pipe of the value of $16,000. If half of this pipe were not delivered by the 25th day of September, 1887, the penalty would be one per cent. for one-half of the pipe—that is, $80 per day for every week day of delinquency; and if all the pipe were not delivered by the 10th day of November, 1887, the penalty of one per cent. for every week day would involve the loss to the plaintiff of $160 per day. Ten days would be ten per cent. of the whole contract price, and one hundred days would be the whole of the contract price, so that if the
49 plaintiff were rigidly bound to the terms of this contract and this should be construed to be liquidated damages, if for any reason, according to the claim of the District of Columbia, it was prevented from delivering the pipe contracted for for one hundred days and it did deliver it, the District could get the pipe for nothing. The plaintiff would not be entitled to anything under this contract. Now, I do not think that any argument is needed to

show that such a provision in a contract is not a provision contemplating liquidated damages, but a penalty, and that view is sustained by the weight of authority. I have no difficulty at all over the construction of that provision. It is not liquidated damages. It is not claimed to be liquidated damages. It is not stipulated for as liquidated damages, and it is out of all proportion to the damages the District might sustain by reason of non-delivery on time, and still more clearly is that so when you consider the provision found on the next page: "The work must be commenced within (blank) days and completed within 136 days after the date of the execution of the contract; if not so completed the pay of all inspectors employed on the work after the time fixed for its completion will be charged against and deducted from any money that may be due or become due to the contractor, as well also the sum of $10 *per diem* for the same period, estimated as liquidated and fixed damages to the District arising from failure to complete the work at the time specified, time of completion of the contract being an essential element and consideration." There the contract makes a clear distinction between the loss of one per cent. per day for failure to perform in time and this stipulation of liquidated damages. This is called liquidated damages, "fixed damages to the District of Columbia arising from failure to complete the work at the time specified, the time of completion of the contract being an essential element and consideration." There is somewhat of a lack of agreement between this provision and the preceding provision. This is called liquidated damages, and the time of completion is declared to be of the essence of the contract. Nothing of the kind is said about the preceding provision, and it appears, therefore, to be clear that the provision for the deduction of one per cent. of the contract price for the delinquent articles is a penalty. It is claimed by the District of Columbia that the 136 days should begin to run from the day of the date of the contract. Whether that is so or not depends upon the construction of the contract, and it is a question for the court to determine. The provision is that "all work must be commenced within blank days and completed within 136 days after the date of the execution of the contract" *the date of the execution of the contract.*" It appears to me that if it had been intended to indicate by that language the *date* of the contract it would have been much easier and more simple to have said from the date of the contract than from the date of the execution of the contract Another indication that the Commissioners intended by this to mean the date when the contract was executed is the fact that under the law, until the
50 contract is executed by the Commissioners of the District of Columbia in compliance with law under an express provision of statute, it shall be absolutely void. Now, it appears by the testimony that the Camden iron works, when it executed this contract, affixed the name of its president and the seal of the corporation, it had not been executed by the District of Columbia through its Commissioners. The date of the instrument, the 29th day of June, 1887, is the day when the president of this corpora-

tion signed it and affixed the seal. He forwarded it to the Commissioners of the District of Columbia, and repeatedly wrote them asking that the contract be executed by the District of Columbia and returned to him in order that he might begin his work. He was bound to know, I suppose that he did know, that until the contract was executed by the Commissioners of the District of Columbia, in compliance with law, it was absolutely void, and that it was not safe for him to enter upon the performance of the contract. It further appears by the evidence that the contract was not returned to him with the signatures of the Commissioners affixed until the 4th day of August, and then it was executed by only two of the three Commissioners, and as an instrument at that time it was not complete—as a contract it was not complete. In suing upon this contract the plaintiff had been obliged to rely upon the copy of the instrument in the hands of the District of Columbia, and that is the only depositary where a completely executed instrument is found. The plaintiff has a perfect copy of the contract, but it was only executed by Commissioners Wheatley and Ludlow. It appears by the evidence that Mr. Webb was sick at that time, and possibly away from the office of the District of Columbia, and he probably did not execute that contract until long after August 4th. Now, if the contract is not in force until executed in compliance with law, it would be a rather anomalous provision to require the contracting party to begin the performance of his contract before it was actually in force, and possibly to be subjected to its penalties before it was actually executed by the Commissioners of the District of Columbia. And if the contention that these provisions all related to the date of the contract instead of the date of the execution of the contract is to hold, then, that this absurd result is possible, that if the Commissioners of the District delayed in executing the contract until the time had elapsed within which the pipe was to have been delivered, then the plaintiff was subjected to all the penalties of the contract before the contract was in force.

Now, another proposition is this: It is claimed that the time of performance, in the first place, was waived by the Engineer Commissioner Ludlow in a private conversation—that is, a conversation in Philadelphia, not at the office of the Commissioners—between him and the president of this plaintiff company, and it is also claimed in behalf of the plaintiff that about November the 30th there was some correspondence between the plaintiff and the District Commissioners, in which the District Commissioners asked the plaintiff company to waive so much of the contract as related to pipe not then cast. That was the 30th day of November, 1887,
51 when, as it is claimed by the District of Columbia now, this contract was no longer in force, and that the plaintiff cannot sue upon the contract because the pipe had not been delivered by November the 10th. We have a letter from the Engineer Commissioners on the 30th of November, asking the plaintiff to waive its right under the contract to deliver the balance undelivered of the 12-inch pipe. The plaintiff, by its president, replied

that it would do so, provided the District would not insist upon any penalties or any damages for failure to deliver on time and would pay for the pipe according to the contract price. The reply to that was, Send the pipe on. Now, the question raised is whether that was not a new contract by parol and a substitute for the specialty, and whether the remedy of the plaintiff is not necessarily in assumpsit instead of covenant. I think not. It raises two questions. In the first place, whether the time of performance might not be waived and the right to sue upon the contract still be preserved. I think it perfectly clear that it may be. In the second place, whether the District of Columbia, through its municipal officers, might not be estopped to claim that the contract was not performed in time, and be estopped to claim the penalties provided for in the contract for non-delivery on time. It appears to me that both of these propositions are correct; that the time of performance may be waived and the right to compensation under the contract as a covenant may be preserved, and that the District of Columbia by its acts may estop itself from claiming penalties. In the case of Phillips *vs.* Seymour, 91 U. S., at page 650, Justice Miller says in the last paragraph:

"If the builder has done a large and valuable part of the work, but yet has failed to complete the whole or any specific part of the building or structure within the time limited by his covenant, the other party, when that time arrives, has the option of abandoning the contract for such failure or of permitting the party in default to go on. If he abandons the contract and notifies the other party, the failing contractor cannot recover on the covenant, because he cannot make or prove the necessary allegation of performance on his own part. What remedy he may have in assumpsit for work and labor done, materials furnished, etc., we need not inquire here; but if the other party says to him, I prefer you should finish your work, or should impliedly say so by standing by and permitting it to be done, then he so far waive- absolute performance as to consent to be liable on his covenant for the contract price of the work when completed."

Now, the only other question that occurs to me that I have a memorandum of is the question of interest. It is claimed that inasmuch as the District of Columbia was not sued promptly when the cause of action accrued or promptly after the cause of action accrued to the plaintiff that the plaintiff has been guilty of laches and is not entitled to interest. The only cases that are cited do not touch this case. The questions were entirely different. The question now is whether in an action of this character the jury are to be controlled by the court and directed whether or not they shall award interest as damages for the non-payment of the contract price if they give the plaintiff a verdict. I think not. The
52 statute allows the jury to pass upon that question. It is not in the power of the court in a case of this character to determine the question of interest unless the question arises upon the face of the contract. This would not be a question for the court to determine.

These considerations result in the necessary rejection of the first, second, and third instructions asked by the defendant; also the last one handed in this morning, which is the sixth.

This being all the evidence, the plaintiff, by its counsel, prayed the court to instruct the jury as follows:

If the jury believe from the evidence that there was a special contract between the plaintiff and the defendant in relation to the manufacture and delivery of certain cast-iron pipe, although the same was not fully performed by either party, yet if the plaintiff cast and delivered pipe in accordance with the specifications of said contract and the defendant accepted the same and appropriated it to its own use, the plaintiff is entitled to recover in this action the value of the pipe so accepted at contract prices, deducting therefrom the liquidated damages specified in said contract sustained by the defendant, if any, by the failure of the plaintiff to deliver the pipe within the time limited by the contract, and any payments on the same.

(Granted.)

Unless the jury find from the evidence that the defendant suffered damage by reason of the failure of the plaintiff to deliver pipe within the time or times limited in the contract, their verdict must be for the plaintiff for the full value of the pipe at contract prices actually received and accepted by the defendant, less payments made on account of the same, and the liquidated damages specified in said contract as for delay in delivery.

(Covered by No. 1; not granted.)

If the jury believe from the evidence that the plaintiff corporation was prevented from completing the delivery of pipe by it stipulated to be manufactured and delivered under the contract offered in evidence within the time or times therein limited by any act or omission on the part of the defendant, then the defendant is not entitled to charge against the plaintiff any fines or penalties for such delay in delivering pipes as was occasioned by such act or omission.

(Granted.)

If the jury believe from the evidence that the defendant by its silence or conduct caused the plaintiff corporation to believe, on or about the 1st day of December, A. D. 1877, that all pipe thereafter delivered would be taken and paid for at contract rates, without any deduction, and thereby induced the plaintiff to act on that belief and thereafter deliver pipe to the defendant, which the plaintiff would not have otherwise done, and the defendant accepted such pipe, the defendant is estopped from charging against the plaintiff any fines or penalties for not delivering such pipe within the time or times specified by the contract.

Granted.

53 And thereupon the defendant, by its counsel, prayed the court to instruct the jury as follows:

On the whole evidence in this case the jury are instructed that their verdict should be for the defendant.

Refused.

The jury are instructed that there can be no recovery against the defendant in this case based upon the contract of June 29th, 1887, offered in evidence by the plaintiff.

Refused.

The jury are instructed that the plaintiff is not entitled to recover in this action the price of iron pipe delivered to the defendant after November 10th, 1887.

Refused.

If the jury believe from the evidence that the failure of plaintiff to deliver the iron pipes mentioned in the contract given in evidence at the times and in the quantities specified hindered and delayed the defendant in extending the water service in 1887, then the defendant had a right to charge against the price it agreed to pay the plaintiff for the pipe it undertook to deliver as liquidated damages the penalties provided in the contract.

Refused.

If the jury find for the plaintiff, they are instructed that the plaintiff is not entitled to interest on its claim prior to the institution of this suit.

Refused.

The jury are instructed that the contract given in evidence in this case was executed on the 29th of June, 1887, and the plaintiff is estopped from claiming it was executed on any other day.

Refused.

The jury are instructed that the contract given in evidence in this case was executed on the 29th of June, 1887, and the time within which the iron pipes specified in said contract were to be delivered is to be computed from said date.

Refused.

To the refusal of the court to grant said several prayers of the defendant and allow the same to be read to the jury and the granting of the several prayers of the plaintiff the defendant, by its counsel, excepted, severally and respectively, and said exceptions were noted on the minutes of the court, and said counsel prays the court to sign and seal this the defendant's bill of exceptions to said several rulings and each of them, which is accordingly done, now for then, this 23d day of February, A. D. 1899.

A. C. BRADLEY, *Justice.*

Whereupon the court of its own motion charged the jury as follows:

By the COURT: After all, gentlemen of the jury, this case which promised so many complications is simplified very materially and there are very few questions that you will be called upon to consider in making up your verdict. It is conceded that the
54 amount shown to be due by the District of Columbia on account of pipe furnished by the plaintiff, received and accepted by the District of Columbia without any credit on account of this indebtedness because of penalties or forfeitures, is $11,044.16. The plaintiff claims that it is entitled to recover that amount, with interest from the 27th day of February, 1888, because it says that

the entire amount was due at that time, that being the date when the last instalment of pipe was received by the District of Columbia from the plaintiff.

It claims interest upon this amount because at that time it says the debt was due and because it says the law allows interest as damages for the non-payment of the debt that is overdue. The statute relating to interest in the District of Columbia reads: "The rate of interest upon judgments or decrees and upon the loan or forbearance of any money or goods or things in action shall continue to be six dollars upon the hundred dollars for one year and after that rate for a greater or less sum or for longer or shorter time, except as provided in this chapter," and then it is provided that if any greater rate of interest is contracted for by a contract that is not in writing all the interest shall be forfeited, and that if any greater rate of interest than ten per cent. is contracted for in writing all the interest shall be forfeited. By this statute Congress fixes the rate of interest for the forbearance of payment of debts at six per cent., and as well the same rate of interest upon judgments and decrees. As business men you know very well that if you receive a promissory note that does not bear interest and the note is not paid at maturity you have a right to demand of the maker of that note or of the parties to it the payment of interest at six per cent. after maturity. So if the note bears upon its face a greater rate of interest than six per cent, but it does not provide for a continuance of that rate after maturity, the holder of that note is entitled to exact the rate of interest specified in the note up to the time of maturity and the legal rate of six per cent. after maturity. So it is a fact, as you know, if a merchant renders a bill claiming an amount for goods sold and delivered to his debtor and the debtor does not pay, he can exact from him interest upon the bill in making payment. While such is the law, yet there may be circumstances in a case that in the judgment of the jury would disentitle the party who claims interest from exacting or receiving it. Now, the question is whether there are any circumstances in this case differing from the circumstance of ordinary delay where a creditor fails to bring an action which would indicate as matter of justice and good faith between this plaintiff and the District of Columbia that the District should not be called upon to pay interest. The mere fact that a man does not bring his action within a certain time is certainly no justification for the claim on the part of the defendant that he ought not to pay interest. He has the use of the money during the time that he is not sued and before he is compelled to pay by the process of the court, and there is no good reason in morals or in law why he should not pay interest for the detention and use of the money. With these remarks the court will submit to you whether under all the circumstances in this case
55 the District of Columbia should pay interest upon whatever amount you find to be due from the 27th day of February, 1888, or whether it should pay interest from a later date. Now, under the contract that has been offered in evidence, which fixes the rights of the plaintiff and defendant, it is stipulated that unless the pipe that is contracted for shall all be delivered within 136

days from the date of the execution of the contract a penalty shall be deducted from the payments that would become due under the contract of $10 per day, and, in addition, the compensation paid after that time to inspectors who were engaged upon the work of inspecting the pipe. It appears by the evidence that this contract did not take effect until somewhere between the first and the fourth of August. It appears, I believe, that the plaintiff received a copy of the contract on the 5th day of August, and that he had made several efforts prior to that time to obtain from the Commissioners of the District of Columbia a copy of the contract. As matter of law, ordinarily an instrument of this nature does not take effect until delivery. Although it was signed on the 29th day of June, 1887, by the Camden iron works, yet it did not become a contract until it was signed and executed by the Commissioners of the District of Columbia. Now, when did they execute it? That you must determine from the evidence in this case. It took effect as a contract when they executed and delivered it. In addition to the difficulty arising out of the common-law doctrine that a written contract is not effectual before delivery, the statute relating to contracts made by the Commissioners of the District of Columbia, the act of June 11, 1878, provide that "no contract involving an expenditure of more than one hundred dollars shall be valid until recorded and signed as aforesaid"—signed by all of the Commissioners of the District of Columbia. So that, however the court regards the question of delivery as affecting the time when this contract shall take effect, the fact is that under the law this contract was not valid and could not take effect under this statute until it was executed and signed by all of the Commissioners of the District of Columbia. Now, when you determine the time when the contract was actually executed by the signatures of the Commissioners and delivered to the plaintiff, from that date you will begin to count the 136 days within which the contract was to be completed, and until the expiration of 136 days there can be no penalties charged against the amount that the plaintiff is entitled to receive under his contract for pipe delivered, received, and accepted by the District of Columbia. This one per cent. for failure for each day's delay in delivering one half by September 25th and the other half by November 10th has been excluded from your consideration because the court regards that as plainly a penalty which the law will not enforce. So the only question of damage relates to the provision that after 136 days $10 a day shall be deducted for delay, and as well the expense of the pay of the inspector.

Now, as against that the plaintiff claims that there was a delay in addition to this 136 days, a delay of 30 days or more, occasioned by the act of the Commissioners of the District of Columbia or their agents. Involved in this delay is one element which is said to be attributable to caprice on the part of the inspector in rejecting pipe that he ought to have accepted, because it really did comply with the contract and specifications. If that were definitely and explicitly shown, I think there would be

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no more question about it, for the plaintiff is entitled to claim that it is not liable for any delays that were thus occasioned; but it seems to me that the evidence is entirely too indefinite for the jury to figure upon it. You cannot tell from the testimony, I think, just what pipes were capriciously rejected by the inspector that were manufactured in compliance with the contract and specifications. There is some evidence tending to show that Hoyt was capricious; that he was not a man of good judgment or of unbiased judgment in reference to the plaintiff; but it seems to me that to justify a claim by the plaintiff of specific delay on account of this capriciousness of the inspector the testimony ought to be specific and definite. With reference to the claim that the inspector was delayed for some length of time, if that is definite, and the time that is claimed the delay was caused by that neglect to inspect, by the neglect of the inspector to go to Philadelphia and inspect the water pipe, to the extent that you find that it is proven, I think it is clear that the plaintiff is entitled to add that to the 136 days; then, having found the time at which the ten dollars a day should begin to be charged, you should also determine whether within that time there is any penalty to be charged by reason of the pay of the inspector. The pay of the inspector must be charged after the expiration of the 136 days, and whatever further amount, at $10 per day, you may see fit to add under the testimony. If the inspectors performed their work before that time and were paid, it is not chargeable against the plaintiff. Now, the plaintiff claims, in addition to that, that no deductions ought to be allowed at all, because on the 30th day of November, or about that time, some correspondence was had between Major Symons or Col. Ludlow, representing the District of Columbia, and the plaintiff, in which the plaintiff was asked to forbear the delivery of any further pieces of 12-inch pipe under their contract. The plaintiff replied that it was perfectly willing to do that, provided the District would pay for the pipe subsequently delivered at contract prices, without deductions, and the reply was received by plaintiff from the District of Columbia, through its agents, to send on the pipe. Now, if you believe that by that act the District of Columbia intended to mislead the plaintiff into sending this pipe, acting upon the theory that no penalties were to be charged against it, and, acting upon that idea, the pipe was subsequently delivered, the District of Columbia is not entitled to charge up against the plaintiff such penalties. So, if you believe from all the circumstances in evidence that the District of Columbia, through its officers, waived the imposition of these penalties about the 30th day of November or the first day of December, as
57 claimed, the District of Columbia is bound by such waiver and cannot charge up against the amount to which the plaintiff is entitled this $10 a day on the pay of the inspectors.

Now, with these remarks, gentlemen of the jury, it may be a matter of mere mathematics to determine what amount the plaintiff is entitled to. Determine whether the District of Columbia is entitled to any deductions from this amount. If so, what, and when you have determined the amount also determine from what

time the plaintiff is entitled to interest on the amount that you find to be due, and return your verdict for that amount, with such interest.

To which charge by the court there were no exceptions.

A. C. BRADLEY, *Justice.*

February 20, 1899.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the above and foregoing pages, numbered from 1 to 104, inclusive, to be a true and correct transcript of the record and proceedings in said court, as prescribed by rule 5 of the Court of Appeals of the District of Columbia, in cause No. 37661, at law, wherein Camden Iron Works is plaintiff and The District of Columbia is defendant, as the same remains upon the files and of record in the said supreme court of the District of Columbia.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, this 10th day of March, A. D. 1899.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 884. The District of Columbia, appellant, *vs.* Camden Iron Works. Court of Appeals, District of Columbia. Filed Mar. 10, 1899. Robert Willett, clerk.

58 FRIDAY, *May 12th, A. D.* 1899.

THE DISTRICT OF COLUMBIA, Appellant, *vs.* CAMDEN IRON WORKS. } No. 884.

The argument in the above-entitled cause was commenced by Mr. A. B. Duvall, attorney for the appellant, and was continued by Mr. Samuel Maddox, attorney for the appellee, and was concluded by Mr. A. B. Duvall, attorney for the appellant.

59 THE DISTRICT OF COLUMBIA, Appellant, *vs.* CAMDEN IRON WORKS. } No. 884.

Opinion.

Mr. Chief Justice ALVEY delivered the opinion of the court:

This action was brought by the appellee, The Camden Iron Works, a corporation created under the laws of the State of New Jersey, against the District of Columbia, to recover the price of certain iron pipes manufactured for and delivered to the defendant by the plain-

tiff, under contract under seal. The action is brought in covenant, upon the theory and according to the contention of the plaintiff, that the contract is a specialty contract of the defendant, and one of the principal questions in the case is, whether the agreement sued on is the deed of the defendant, or only a simple contract.

There were several pleas interposed,—all going to and denying the right of the plaintiff to recover,—though some of them in form are appropriate only to an action of *assumpsit;* but among the pleas is the plea of *non est factum.* There is no question made, however, as to the inconsistency or inappropriateness of the pleas, and issue was joined on them all, except the plea of the statute of limitations, to which a demurrer was entered; and the demurrer was sustained and the plea ruled bad. This plea of the statute of limitations of three years was pleaded as a bar, upon the theory that the proper action upon the contract was *assumpsit*, and not covenant. But the court did not entertain that view, and accordingly ruled the plea bad on demurrer.

The contract bears date the 29th day of June, 1887, and on its face and by its terms it professes to be made by the District of Columbia, of the first part, and the Camden Iron Works, by Walter Wood, president, of the second part. The contract is conceded to have been for and in behalf of the municipal corporation of the District of Columbia and for material to be supplied for the water department of the District of Columbia; and the contract throughout professes to be made by and between the District of Columbia and the Camden Iron Works. The conclusion of the contract is as follows:

"In witness whereof, the undersigned, William B. Webb, Samuel E. Wheatley, and William Ludlow, Commissioners of the District of Columbia, appointed under the act of Congress entitled 'An act providing a permanent form of government for the District of Columbia,' approved June 11, 1878, and the party of the second part to these presents, have hereunto set their hands and seals the day and year first above written.

"WILLIAM B. WEBB, [L. S.]
"S. E. WHEATLEY, [L. S.]
"WILLIAM LUDLOW, [L. S.]
"*Commissioners of the District of Columbia.*
"WALTER WOOD,
"*Pres't Camden Iron Works.*

[Corporate Seal Camden Iron Works.]

"Signed and sealed in the presence of—
"E. H. DIEFFENBACH."

This contract was proved and offered in evidence by the plaintiff, but its admissibility was objected to by the defendant, upon the ground that the declaration was in covenant, declaring upon a sealed instrument, whereas the contract offered in evidence is not under the corporate seal of the District of Columbia, and therefore not the covenant of the defendant, but a simple contract merely. The objection being overruled, the defendant excepted.

The plaintiff then proved that the municipal corporation of the District of Columbia had a corporate seal, but that the same had not been generally used, until after the contract here sued upon had been executed, and had only been used in executing deeds of conveyance, and instruments of that character. And the plaintiff further proved by competent evidence that though the contract bears date the 29th of June, it was not in fact executed and delivered by the Commissioners before August 4, 1887. This proof was also objected to by the defendant; and the objection was taken upon the ground that it was not competent to the plaintiff to show by parol evidence that the real or true date of the con-
60 tract was other or different from that stated on its face; and that the plaintiff was estopped from showing by parol that the contract was not in fact signed by the defendant, and did not go into effect until a date subsequent to that expressed in the instrument. This objection was likewise overruled by the court, and the defendant excepted.

The contract provided for the manufacture of certain designated sizes of iron pipe by the plaintiff, and its complete delivery to the defendant, "within 136 days *after the date of the execution* of the contract; one-half of each size to be delivered on or before September 25, 1887, and the remainder on or before November 10, 1887." For failure to deliver the pipes within the time thus fixed, the contract provided that there should "be deducted from the contract price, as in said contract specified, 1 per cent. of the contract price for all delinquent articles for each and every week day that they remained delinquent." There was a further provision that for failure to complete the work at the time specified, there should be deducted from the money to become due under the contract "the sum of ten dollars *per diem* for the same period estimated as liquidated and fixed damages to the District."

In the contract there was provision made for inspecting the iron pipes and "to determine whether there was any reason for rejection, prior to delivery." Payments were to be made after August 1, 1887, for all pipe "received and accepted in proper order and condition, less 20 per cent. of the amount found due, to be reserved until the satisfactory completion of the contract."

There appears to have been a suspension in the execution of the contract, owing to misunderstandings as to the qualities of the work, and the inspection thereof; and consequently, but a small proportion of the pipe was delivered prior to November 30, 1887. But after that date, pipe worth $11,404.09, at contract rates, according to estimate made, was delivered to and accepted by the District of Columbia, and used by the corporation. The total value, at contract rates, of all the pipe delivered to and accepted by the District of Columbia, was $16,335.87, on which there was paid in cash $5,291.71, by two checks, which did not indicate that they were meant to be in full settlement of all moneys due under the contract; and the balance, $11,044.16, was more than counterbalanced by the fines and penalties charged up by the defendant for non-delivery of the pipe within the time specified in the con-

tract. It was for this balance of $11,044.16 with interest thereon from the 27th of February, 1888, that this action was brought. There is no pretense that there was any demand made by the defendant for any more or other quantity of pipe than that delivered under the contract and which was refused to be delivered by the plaintiff. On the contrary, on November 30, 1887, when Captain Symons, the Assistant Engineer Commissioner of the District, requested that no more pipe should be cast for delivery under the contract, there remained to be cast about 340,000 pounds, on which the profits to the plaintiff, at contract prices, would have been about $1,300. After the plaintiff's letter of November 30, 1887, assenting to the cancellation of the contract, *as to all pipe not then manufactured*, provided all pipe then manufactured should be taken and paid for at contract rates, without deductions, and Captain Symons' reply thereto, directing the sending on of the pipe then cast and accepted by Hoyt, the value of the pipe, at contract rates, actually shipped to the defendant, was $11,404.16. It was for this amount that the verdict was rendered, with interest, and without any allowance or deductions for forfeitures or penalties for non-delivery of pipe within the time prescribed by the terms of the contract.

Upon the whole evidence, both plaintiff and defendant offered prayers for instructions to the jury; and those on the part of the plaintiff were granted, while those offered by the defendant were refused.

By the first of the instructions given at the instance of the plaintiff, the jury were directed that, upon finding the execution of the contract, although they might find that the same "was not fully performed by either party, yet if the plaintiff cast and delivered pipe in accordance with the specifications of said contract, and the defendant accepted the same and appropriated it to its own use, the plaintiff is entitled to recover in this action the value of the pipe so accepted at contract prices, deducting therefrom the liquidated damages specified in said contract sustained by the defendant, if any, by the failure of the plaintiff to deliver the pipe within the time limited by the contract, and any payments on the same."

By the second instruction granted, the jury were directed, that if the plaintiff "was prevented from completing the delivery of pipe by it stipulated to be manufactured and delivered, under the contract offered in evidence, within the time or times therein limited, by any act or omission on the part of the defendant, then the defendant is not entitled to charge against the plaintiff any fines or penalties for such delay in delivering pipes as was occasioned by such act or omission."

And by the third instruction granted, the court informed and directed the jury, "that if the defendant by its silence or conduct caused the plaintiff to believe, on or about the 1st day of December, 1887, that all pipe thereafter delivered would be taken and paid for at contract rates, without any deduction, and thereby induced the plaintiff to act on that belief, and thereafter deliver pipe to the defendant which the plaintiff would not have otherwise done, and the

defendant accepted such pipe, the defendant is estopped from charging against the plaintiff any fines or penalties for not delivering such pipe within the time or times specified by the contract."

The prayers on the part of the defendant were substantially and in effect the converse of the instructions given at the instance of the plaintiff. They sought to have it declared to the jury, that the plaintiff could not maintain this form of action upon the contract, and therefore the verdict should be for the defendant. That there could be no recovery upon the contract for the price of the pipe furnished to the defendant after November 10, 1887. That if any recovery could be maintained by the plaintiff against the de-
61 fendant for the pipe delivered, it was the right of the defendant to charge against the price, as liquidated damages, the penalties provided for in the contract. That no interest could be properly allowed on any amount awarded to the plaintiff prior to the institution of the suit. That the contract given in evidence appears on its face to have been executed on the 29th of June, 1887, and that the plaintiff is estopped from claiming that it was executed on any other day; and that the time within which the pipe specified in the contract was to be delivered should be computed from that date.

To the ruling of the court in respect to the prayers of the plaintiff, and to the rejection of those offered by the defendant, the latter excepted, and has appealed to this court.

The appellant has assigned some eleven errors in the rulings of the court to which we have referred; but these assignments may be reduced to four or five main and controlling propositions for which the appellant contends; and they are the following:

First. That the contract was not a specialty under the seal of the municipal corporation of the District of Columbia, but a simple contract merely, and therefore an action of covenant will not lie thereon against the corporation.

Second. That it was not competent to the plaintiff below to show by parol proof that the contract was finally and completely executed and delivered by the defendant at a date subsequent to that mentioned in the contract itself; and that the date inserted in the contract is the date from which the time allowed for the manufacture and delivery of the pipe should be computed.

Third. That the manufacture and delivery of the pipe required by the contract, within the time mentioned therein, constituted a condition precedent, and that no recovery can be had in this action upon the contract for any pipe delivered to and accepted by the defendant after the time specified in the contract for the delivery of the pipe; and, consequently there was error in granting the first prayer offered by the plaintiff, the present appellee.

Fourth. That, if the appellee be entitled to recover in this action for the pipe delivered after the times mentioned in the contract, the appellant, the defendant below, was entitled to charge up and deduct from the contract price of the pipe as *liquidated damages*, the penalties provided for in the contract.

Fifth. That if recovery be allowed, no interest should be included in such recovery.

These propositions embrace the whole scope of the contentions on the part of the appellant.

1. With respect to the first of these propositions, we think there is no difficulty, and that the court below was entirely right in holding the contract to be the deed—a specialty—executed in a lawful manner by the municipal corporation of the District of Columbia. The municipal corporation has the right to adopt a seal, and from time to time, to change it. It has the right, therefore, to execute contracts under seal. The three Commissioners provided for in the organic act passed by Congress, June 11, 1878 (20 Stat., 103), are the chief executive officers of the municipal government, and contracts executed by them, under their hands and seals, intended as and manifestly are official acts, have the force and effect of deeds or sealed instruments, according to their import, and bind the corporation and not the individual Commissioners. Respecting seals, says Judge Dillon (1 Dill., Mun. Corp., sec. 190): "The same general principles apply to private and to municipal corporations. Thus, a corporation of the latter class would doubtless be bound equally with a private corporation by any seal which has been *authoritatively affixed* to an instrument requiring it, though it be not the seal regularly adopted;" citing for this proposition the cases of Bank, etc., *v.* Railroad Co., 30 Vt., 150; Tenney *v.* Lumber Co., 43 N. H., 343; Mill Dam Foundry *v.* Hovey, 21 Pick., 417; Porter *v.* Railroad Co., 37 Me., 349. A corporation may adopt any seal that it chooses for the time being or *pro hac vice;* and although it may have adopted a particular seal, it will be bound by a deed, otherwise sufficient, which is sealed *with any seal.* Bank, etc. *v.* Railroad Co., *supra;* Tenney *v.* Lumber Co., *supra;* South Baptist Soc. *v.* Clapp, 18 Barb., 36; Hutchins *v.* Byrnes, 9 Gray, 367; Mann *v.* Pentz, 2 Sand. Ch., 257. The form or material of the seal is quite immaterial; it is rather the *insignia* that furnishes the evidence of the seal. The object of a seal is to give character to the instrument and to enable it to be distinguished and recognized for that which it was intended to be. This is as well effected by a scroll with the word seal written within it, or with the initials "L. S." Hastings *v.* Vaughn, 5 Calif., 318.

Several of the cases cited in the brief of counsel for the appellee are very analogous to the present case; and without reciting the facts of those cases, it will suffice simply to refer to them by title, as they have been cited and approved in cases of more conclusive authority upon this court. The cases referred to are those of Stinchfield *v.* Little, 1 Greenl. Rep., 231; State *v.* McCauley, 15 Calf., 429; Hopkins *v.* Mehaffey, 11 Sergt. & R., 126; Tenney *v.* Lumber Co., 43 N. H., 344.

In the cases of Sheets *v.* Selden, 2 Wall., 177, 187, and Jacksonville, etc., R. R. Co. *v.* Hooper, 160 U. S., 514, the decisions of the Supreme Court of the United States would seem to be quite conclusive of the present question. In the first of the cases just mentioned, the court, by Mr. Justice Field, said: "It may be stated

generally that when a deed is executed, or a contract is made on behalf of a State by a public officer duly authorized, *and this fact appears upon the face of the instrument, it is the deed or contract* of the State, notwithstanding that the officer may be described as one of the parties, and may have affixed *his individual name and seal.* In such cases the State alone is bound by the deed or contract, and can alone claim its benefit." And the court cite in support of this principle the cases of Stinchfield *v.* Little and the State *v.* McCauley, *supra.* In the second and more recent of the Supreme Court cases mentioned, that of Jacksonville R. R. Co. *v.* Hooper, in an action of covenant, and where the instrument sued on was executed in very much the same form and terms as was the instrument in the present case, it was held, Mr. Justice Shiras delivering the opinion, that "whether an instrument is under seal or not is a question for the court upon inspection; whether a mark or
62 character shall be held to be a seal depends upon the intention of the executant, as shown by the paper;" citing the cases of Hackers' appeal, 121 Penn. St., 192, and Pillow *v.* Roberts, 13 How., 472.

In the present case there is no question made as to whether the contract is the contract of the District of Columbia, and binding upon it; that is conceded. But it is denied by the appellant that the contract is its deed, upon which an action of covenant can be maintained. This contention is wholly without foundation, as is clearly shown by the authorities to which we have referred.

2. The next question is that which relates to the admissibility of parol evidence to show that the contract was in fact executed and delivered by the Commissioners at a date subsequent to that stated in the contract. But this question we think is without reason or principle to support it. No principle is better established than that it may be averred in pleading and shown in proof that a deed, bond, or other instrument, was in fact made, executed and delivered at a date subsequent to that stated on its face. In the old case of Oshey *v.* Sir Baptist Hicks, Cro. Jac., 263, in an action of covenant, where, by a charter-party under seal, *bearing date the 8th of September*, it was agreed that the defendant should pay for a moiety of the corn which *then* was, or afterwards should be, laden on board a certain vessel, the defendant pleaded that the deed was not delivered *until the 28th day of October*, and that on and after that day there was no corn on board; and, on demurrer, it was held a good plea, because the word *then* was to be referred to the time of the actual delivery of the charter-party, and not to its date.

And so in the case of Hall *v.* Cazenove, 4 East, 477, it was held that a plaintiff could declare in covenant that the deed was *indented, made and concluded* on a day subsequent to the day on which the deed or charter-party on its face stated that it was indented, made and concluded. And in the more recent case of Steele *v.* Mart, 4 B. & Cr., 272, in an action of debt on a lease, where the lease purported on its face to have been made on the 25th of March, 1783, *habendum* from the 25th of March now last past. It was proved that the delivery was made after the day of the date, and the court of king's

bench held that the word *now* referred to the time of delivery, and not to the date of the lease. The same principle is clearly and fully stated by the Supreme Court, in the case of the United States *v.* Le Baron, 19 How., 73.

These cases are sufficient to show that there is nothing in the mere date as stated in the deed or contract to estop or preclude either of the parties from showing by parol evidence that the deed or contract was actually made and executed at a date subsequent to that stated in the deed or contract, and that, consequently, such deed or contract can only have effect and operation from the time of its actual execution.

3. With respect to the third proposition contended for by the appellant, the law would seem to be equally well settled against such contention, as it is in respect to the two preceding propositions. There is no question or dispute in regard to the fact that though the contract was not fully performed by either party thereto, according to its terms, yet there was a large quantity of pipe manufactured and delivered by the appellee and accepted and used by the appellant, under the contract; and that the further performance of the contract was determined and put an end to by the mutual consent of the parties; though the contract was not rescinded, except as to the future manufacture of pipe for delivery. In this state of case an objection is made and insisted upon by the appellant, that an action of covenant on the contract will not lie to recover the price of the pipe that was delivered, because the plaintiff cannot truthfully aver and prove that it has well and fully performed the contract on its part to be performed; and that, consequently, the price for the pipe delivered can only be recovered in an action of *indebitatus assumpsit*. But in this contention we do not concur. The pipe, the price of which is sued for, was manufactured, delivered, and accepted, under the contract, in part performance thereof, and with reference to the specifications and price agreed upon, as set forth in the contract. Why, then, should an action of covenant not lie on the contract for the price of the pipe actually delivered and accepted, if proper averments be made and proof furnished, showing why full performance was not had? There would seem to be no sufficient reason for denying the right to maintain the action.

There was a similar question raised and considered in the case of Hall *v.* Casenove, *supra*, that being an action of covenant on a charter-party for freight earned. There the charter-party bore date the *6th of February*, but it was averred not to have been executed in fact *until the 15th of March*, and it contained a covenant by the owner that the ship should and would proceed from the port, where she then lay, *on or before the 12th of February*, on her outward-bound voyage, and upon delivery of her outward cargo, take on cargo and return, etc., and the freighter covenanted that, in consideration of everything above mentioned, etc., he would pay certain freight for the voyage. The voyage was averred to have been performed and the freight earned; and it was held on demurrer, that the owner was entitled to recover in an action of covenant, without averring that the ship sailed *on or before the 12th of February;* that the cov-

enant that the ship should sail *on or before* the 12th of February being either no condition precedent, but only an independent covenant, or not of the substance of the contract, which was for the performance of the voyage for which the ship was chartered and earning the freight; or being rendered impossible to be performed by the acts of the parties themselves, in not having executed the contract till after the time appointed for doing the act, and thereby dispensing with the performance of it; therefore the defendant's plea of non-performance by the plaintiff of the alleged condition precedent, that is, the sailing of the ship *on or before the 12th of February*, constituted no defense to the action. And in delivering his opinion, Mr. Justice Lawrence said: "If the voyage has been performed, and the profits of it gained by the defendant, there can be no foundation for saying that the defendant shall not pay the freight earned."

63 The general principle is applicable in all classes of contracts, whether under seal or not, that if the party to the contract who is entitled to the benefit of a condition upon the performance of which his responsibility is to arise, dispense with, or waive, or by any act of his own prevent the performance, the opposite party is excused from proving a strict compliance with the condition on his part. This is illustrated in cases of frequent occurrence in all forms of actions on contracts. Thus, if the precedent act is to be performed at a certain time or place, and a strict performance of it is prevented by the absence of the party who has a right to claim it, or his want of readiness to accept the work or article to be furnished, or his non-observance of the conditions that are precedent and required to the performance of the contract on the part of the other party to the contract, the law will not permit that party to set up the non-performance of the condition as a bar to the recovery on the covenant or other form of responsibility, which the contract had imposed upon him. This is a settled principle in the law, sustained by numerous authorities, and we do not deem it necessary to refer to other cases upon this subject than Williams *v.* Bank U. S., 2 Pet., 96, 101, and United States *v.* Peck, 102 U. S., 64.

4. In refusing to grant the prayer of the defendant in respect to the right to charge up and deduct from the price of the pipe delivered the aggregate amount of penalties and forfeitures supposed to have been incurred for the delay in the delivery of the pipe under the contract, we think the court was entirely correct.

That prayer completely ignored all the evidence in regard to the causes of delay, and proceeded upon the theory that the right to the penalties and forfeitures was a fixed right that could not be waived, and therefore the defendant was entitled to have them deducted, even though the amount might more than counterbalance the entire amount of the price of the pipe delivered and sued for in this action. But we think the question of the right to such penalties and forfeitures was correctly and fairly submitted to the jury, by the two last of the plaintiff's prayers which were granted by the court. If the strict performance of the contract on the part of the

plaintiff was prevented by the act or course of conduct of the defendant, or was suspended by the action or acquiescence of the defendant, no claim can be justly made for penalties or forfeitures under the contract for such delay or failure to deliver the pipe. This would seem to be the simple dictate of reason and justice, and it is, moreover, in accordance with express decision upon the subject. Holme *v.* Guppy, 3 M. & Wels., 387, 389.

5. With respect to the question as to the right of the plaintiff to be allowed interest on the claim sued for, we think there is no ground for assignment of error on this appeal. The court was clearly right in refusing, on the request of the defendant, to instruct the jury that no interest should be allowed, except from the time of the institution of the suit. In the instruction given the jury on the subject of interest, the court submitted to them the question whether under all the circumstances of the case, the defendant should pay interest upon whatever amount that should be found to be due the plaintiff from the 27th day of February, 1888, the time when the last delivery of the pipe was made, and the money became due, or whether it should pay interest from a later date. We think this instruction was correct, and the court committed no error in refusing to grant the instruction prayed for by the defendant.

Finding no error, the judgment appealed from must be affirmed; *and it is so ordered.*

Judgment affirmed.

64 FRIDAY, *June 9th, A. D.* 1899.

THE DISTRICT OF COLUMBIA, Appellant, *vs.* CAMDEN IRON WORKS. } No. 884. April Term, 1899.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed.

Per MR. CHIEF JUSTICE ALVEY.

June 9, 1899.

65 FRIDAY, *October 6th, A. D.* 1899.

THE DISTRICT OF COLUMBIA, Appellant, *vs.* CAMDEN IRON WORKS. } No. 884.

A writ of error to remove the above-entitled cause to the Supreme Court of the United States was prayed by Mr. A. B. Duvall, attorney for the appellant.

TUESDAY, *October 10th, A. D.* 1899.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
CAMDEN IRON WORKS. } No. 884.

It is ordered by the court that a writ of error to remove this cause to the Supreme Court of the United States, as prayed by the appellant, be, and the same is hereby, allowed, and that citation issue to the appellee.

66 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between The District of Columbia, appellant, and Camden Iron Works, appellee, a manifest error hath happened, to the great damage of the said appellant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the tenth day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

67 UNITED STATES OF AMERICA, *ss:*

To Camden Iron Works, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein The District of Columbia is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, — Justice of the Court of Appeals of the District of Columbia, this tenth day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted Oct. 19, 1899.
SAM'L MADDOX,
Att'y for Camden Iron Works.

[Endorsed:] Court of Appeals, District of Columbia. Filed Oct. 19, 1899. Robert Willett, clerk.

68 Court of Appeals of the District of Columbia.

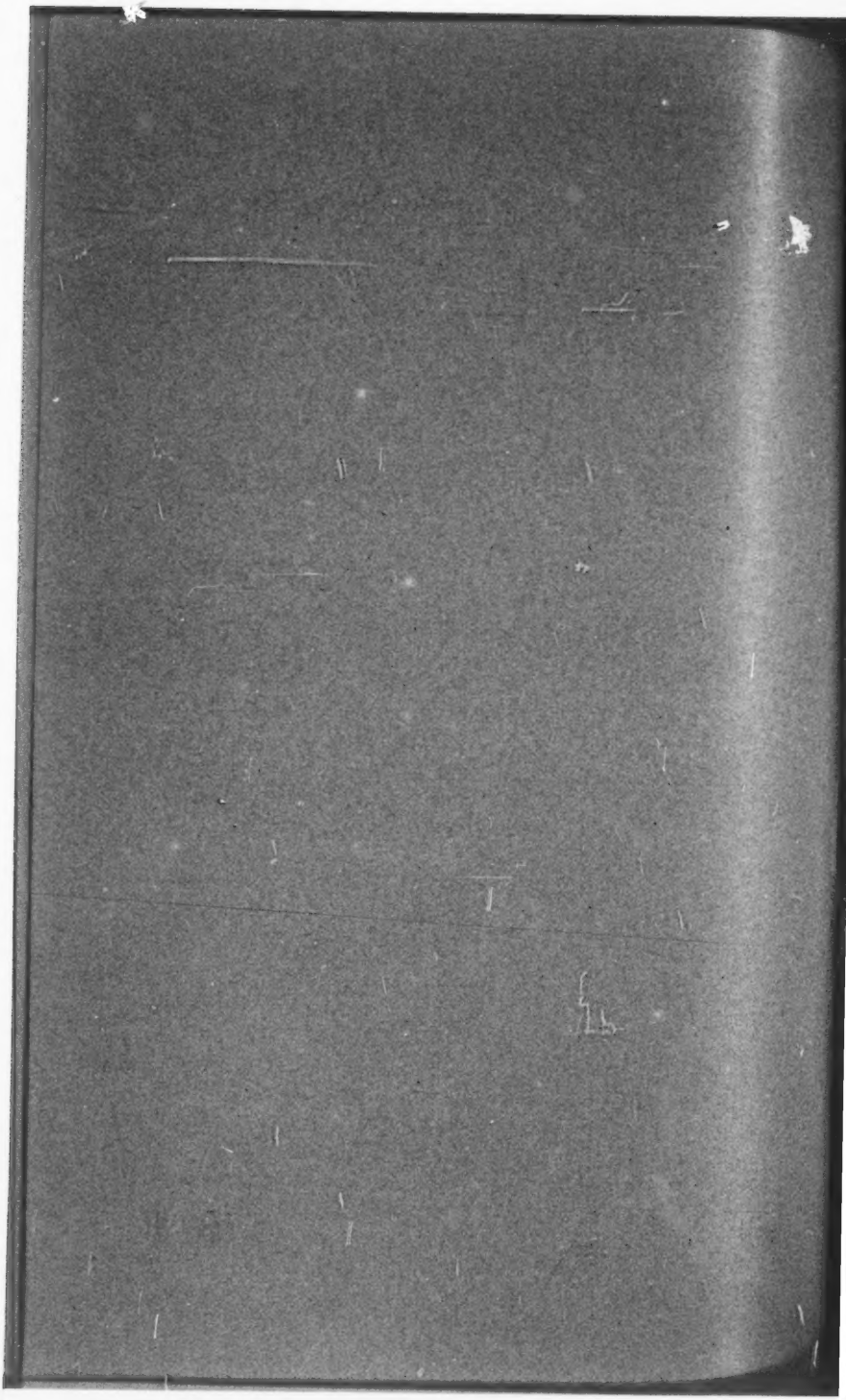
I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 67, inclusive, contain a full, true, and correct copy of the transcript of record and proceedings of said Court of Appeals in the case of The District of Columbia, appellant, *vs.* Camden Iron Works, No. 884, April term, 1899, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 24th day of October, A. D. 1899.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No., 17,591. District of Columbia Court of Appeals. Term No., 172. The District of Columbia, plaintiff in error, *vs.* Camden Iron Works. Filed December 21st, 1899.



In the Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 172.

DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

CAMDEN IRON WORKS, DEFENDANT IN ERROR.

Brief for the District of Columbia, Plaintiff in Error.

This is a writ of error to reverse the judgment of the Court of Appeals of the District of Columbia affirming the judgment of the Supreme Court of the District of Columbia in an action of *covenant* to recover $11,059.16, an alleged balance due the Camden Iron Works on a contract (Rec., p. 9) being the price of certain cast iron pipe delivered by it to the District during the years 1887 and 1888.

The declaration (Rec., p. 1) was of such equivocal character that there were filed to it, among others, inconsistent pleas, thus inviting a demurrer, viz., did not covenant, *non-assumpsit*, performance, non indebitatus, and afterwards by leave of the court, *non est factum*, set off, and the statute of limitations of three years, to which last plea there was a demurrer, which was sustained (Rec., p. 6).

The plea of set-off covered the claim for the penalties prescribed in the contract because of failure to perform its conditions, and to deliver the pipe within contract time and for the value of other pipe the District was obliged to purchase to supply the place of pipe not delivered (Rec., p. 4).

The case went to trial and resulted in a verdict in favor

of the plaintiff below for $11,049.43, with interest from February 28, 1888. A motion for new trial being overruled, judgment was entered (Rec., p. 7), whereupon the defendant took its appeal upon bills of exception to the Court of Appeals of the District of Columbia, where the judgment below was affirmed. 15 App. D. C. 198. And thereupon the present writ of error was sued out.

At the trial, the plaintiff below, having proved the signatures of William B. Webb, S. E. Wheatley, and William Ludlow to the contract sued on, and that they were Commissioners of the District of Columbia in 1887, was permitted to put the same in evidence. The first clause of this contract (Rec. p. 9) was as follows:

> "This contract made and concluded this twenty-ninth day of June, in the year one thousand eight hundred and eighty-seven, by and between the *District of Columbia*, of the first part, and the *Camden Iron Works*, by Walter Wood, its President, of the second part."

The final clause thereof was as follows:

> "In witness whereof the undersigned, William B. Webb, Samuel E. Wheatley, and William Ludlow, Commissioners of the District of Columbia, appointed under the act of Congress, entitled 'An act providing a permanent form of government for the District of Columbia,' approved June 11, 1878, and the party of the second part to these presents have hereunto set their hands and seals the day and year first above written.
>
> "WILLIAM B. WEBB, (L. S.)
> "S. E. WHEATLEY, (L. S.)
> "WILLIAM LUDLOW, (L. S.)
> "*Commissioners of the District of Columbia.*
> "WALTER WOOD,
> "*Pres't Camden Iron Works.*"
>
> (Corporate seal Camden Iron Works.)
>
> "Signed and sealed in the presence of—
> "E. H. DIEFFENBACH."

To the offer of said contract in evidence counsel for the defendant objected, upon the ground that the declaration was in covenant, and declared upon a sealed instrument, whereas said contract was not the covenant, but the simple contract of the District of Columbia; but said objection was overruled and an exception noted (Rec. p. 9).

The plaintiff then proved by William Tindall, Secretary to defendant's Board of Commissioners (Rec., p. 18), that the District of Columbia had a corporate seal; that it was not generally used until after the contract in this case was executed; but it was affixed to deeds conveying real estate of the District, and bonds and securities of the District, and in some cases to tax deeds issued by it.

By Alexander McKenzie, principal accounting clerk in the auditor's office of the defendant, the plaintiff proved (Rec., p. 18), that it delivered 1,025,943 pounds of iron pipe under the contract sued on, between November 18, 1887, and January 17, 1888; that 210,472 pounds of said pipe were received and accepted by the District on February 27, 1888; that the value of the said pipe delivered by the plaintiff to the defendant at contract rates was $16,335.87, on which there was paid in cash $5,291.71, and that the balance, $11,044.16, was offset by fines and penalties for failure to deliver the pipe on contract time.

The plaintiff was also permitted, over the defendant's objection, to prove that the contract sued on was executed by it June 29, 1887, and that at that time it had not been signed by the District Commissioners (Rec., p. 20); that William B. Webb, one of said Commissioners, had not signed it on August 4, 1887. The plaintiff's president, Walter Wood, testified that immediately upon receiving the contract, August 4, 1887, his company got ready to cast the iron pipe required by it, and manufactured a large quantity of it during August, 1887, but that, after the correspondence in regard to the fitness of Hoyt as an inspector, and the receipt of the letter of Capt. Symons, dated Septem-

ber 7, 1887 (Rec., p. 26), the plaintiff stopped work under said contract, and sold to other parties the pipe already manufactured. That between September 10 and 15, 1887, Col. Ludlow came to the plaintiff's office in Philadelphia, and they had a talk about Hoyt; that at this interview the witness told Col. Ludlow that his company would not resume work on the pipe contracted for, unless it was agreed that no penalties would be imposed for delay in delivering it; that Col. Ludlow replied that no injustice would be done, and this led the witness to believe that penalties for delays would be waived, otherwise the plaintiff would have done nothing under the contract; that Mr. Hoyt, the inspector, did not arrive until October 17 following, and work was at once begun, but Hoyt was not inspecting the pipe fairly; that out of a total of 2,726 lengths he rejected 704, of which only 169 did not come up to the specifications. The remaining 435 were put in stock, and sold to other customers at full contract rates.

That on November 30, 1887, when Capt. Symons, by letter (Rec., p. 32), requested that no more pipe be cast under the contract, there remained to be cast about 340,000 pounds, on which the plaintiff's profits at contract prices would have been about $1,300.

That after the plaintiff's letter of November 30, assenting to the cancelation of the contract, as to pipe not then manufactured, provided all pipe manufactured should be taken and paid for at contract rates without deductions, and Capt. Symons' reply thereto, directing the sending on of the pipe then cast and accepted by Hoyt, the value of the pipe actually shipped to the defendant at contract rates was $11,404.09. That after receiving Capt. Symons' letter the plaintiff made no particular haste to deliver the pipe which had been cast and inspected, and it was shipped as schooners could be conveniently chartered (Rec., p. 36).

That under date March 28, 1888, the plaintiff received from the auditor of the District a statement of account, and

a letter under date 30th of the same month, inclosing two checks, one for $2.369.29 and one for $2,922.42. This letter did not state whether the checks were in full (Rec., p. 36), but a little later the plaintiff received a statement of the account, which showed that fines and penalties had been imposed to an amount equal to the value of the pipe shipped after December 1, 1887; that witness protested against that way of settling the account, and made several trips to Washington in regard to the matter; that on one occasion he was referred to Col. Ludlow, who had ceased to be a Commissioner, and was on duty at Detroit, and witness went to Detroit to see him, but he declined to make any recommendation for the readjustment of the account. The witness on February 5, 1889, and November 10, 1892, wrote two letters to the Commissioners (Rec., p. 36).

The plaintiff also gave evidence by Christopher Miller (Rec., p. 39) one of its employees, that a great many of the pipes rejected by Hoyt were good, and were put back in stock. The plaintiff's shipping clerk, Fanning, testified that he knew Hoyt, and that it was next to impossible to make pipe to suit him. That witness got the Washington order August 5, 1887, and that it would have taken forty-five days to have filled it, if the entire force had been put to work on that one order. That many of the pipe rejected by Hoyt were fairly up to the specifications. That the plaintiff first received orders to go ahead with the manufacture of the pipe for the District August 5, 1887, and immediately went to work. About one-third of the entire order was cast in August and September, but the work was suspended and the pipe cast was sold to other customers. After it was determined to resume work, about the middle of September, the plaintiff could have resumed any day after the arrival of the inspector. He came October 17. The plaintiff quit manufacturing pipe for Washington December 1, 1887. That after the plaintiff received the letter of November 21, 1892 (Rec., p. 39), it procured, in accord-

ance with the suggestion of the Commissioners, a bill for its relief to be introduced in Congress, which was done on February 3, 1893; that the plaintiff assumed that the bill was a mere matter of routine, and would be referred to the Commissioners and its enactment recommended by them. After waiting a year, during which no action was taken by Congress, the plaintiff gave up all efforts to settle the account out of court.

For the defendant, Thomas W. Symons (Rec. p. 41), who was assistant to the Engineer Commissioner in 1887, and in charge of the water service, testified that there was a great deal of building going on in Washington in 1887, and a great need for the water pipe; that he visited the plaintiff's shops at Camden, N. J., during the time of the contract to see how the work was getting on, and to ascertain the real objection to Hoyt; that Hoyt explained to witness, in the presence of representatives of the plaintiff, why he rejected some of the pipe; that the reasons for delay in delivering the pipe, as far as he knew, appeared in the correspondence; that the settlement made was with the knowledge and approval of the witness and under his direction at the time it was made; that Colonel Ludlow, the then Engineer Commissioner, is now in Havana.

On cross-examination the witness further testified, in response to questions by the plaintiff's attorney, that he was assistant to Colonel Ludlow, the Engineer Commissioner, in 1887, and had charge of the details relating to the pipe castings under the contract offered in evidence; that he did not know, when he wrote the letter of July 9, that the contract had not been signed by the District Commissioners, and did not consider it material; that he considered it in accordance with the contract to charge against the plaintiff fines for the delay occasioned by the failure of Hoyt to arrive at the Millville foundry after he had been requested so to do; that when he requested the plaintiff, in reply to their letter of November, 30, assenting to a cancelation of the

contract so far as it related to pipes not cast, that all pipes cast should be taken and paid for at contract rates, and to send on and deliver pipe then cast, he did not intend to confiscate by way of fines all pipes that might be sent thereafter; that he did not at that time give any consideration to the question of fines and penalties, which was a matter to be adjusted after the contract was finished; that his intentions related principally to getting the pipe for the benefit of the city; that when he stated in his letter of November 30 that the only question involved was the one of available funds he did not have "up his sleeve" the question about fines which developed later and after the pipe were received; that he did not consider that the contractors had any reasonable or proper excuse for failure to deliver the pipe on time; that, in his opinion, a reasonable excuse for the failure would be that the foundry burned down or the pits burned up.

On redirect examination, in reponse to questions propounded by the counsel for the defendant, the witness further testified that he had heard the testimony of the witness Fanning about the rejection of pipes by Inspector Hoyt, and that, in his opinion, the proportion of pipes rejected by Hoyt was not very large; that there was very little difference in the method of casting commercial pipe, though nearly all water works have a little different drawing on the bell head, though very little; that the witness had examined some of the pipes rejected by Hoyt and found that they were eccentric and some of them were crooked on the small end, but most of his rejections were due to the eccentricities of the pipes (Rec., p. 43).

On further cross-examination, the witness testified that he went to Millville foundry, on the occasion of the visit he had mentioned, in the morning and back again at night; that he was not quite sure he went into the Millville office and did not remember whether or not he had seen the president of the company, Mr. Wood. He could not remember

whether or not this visit was before or after the first of November, though he thought it was shortly after he ordered the work on the Washington contract; that he did not remember whether or not any of the pipes had then been shipped to the District; that the pipes rejected by Hoyt as being eccentric were at the works, though he did not recollect whether they were on skids or in a pile; that he determined about the eccentricities of pipes by rolling them; that he saw them rolled or possibly rolled them himself; that he did not remember how many pipes he so rejected and could not say whether or not they were not the pipe afterwards rejected and broken up by Mr. Miller, the inspector of the plaintiff company; that he did not remember having notified any official of the plaintiff company that he intended to make this visit. On being recalled, the witness further testified that a lot of pipes were purchased by the District outside of the contract, though he could not remember how many.

Henry F. Hayden, for the defendant, testified (Rec. p. 43) that the said plaintiff was awarded the contract given in evidence, it being the lowest and only bidder; that many people in the District were suffering for water, and the failure of the plaintiff to deliver the pipe contracted for was a matter of great annoyance and inconvenience to the people of the District, as well as a source of great expense to them; that so decided was the necessity for the pipe contracted for that it was deemed proper to purchase a quantity of such pipe wherever it could be found in open market and charge the excess of cost over the contract price to the plaintiff; that this was done, and pipe was purchased from Jackson and Woodin, of Berwick, Pennsylvania, and from the Sayre Pipe Foundry Company, of Sayre, Pennsylvania, and the plaintiff was duly informed of this action and it finally concluded to go on with the making of the pipe and to accept Mr. Hoyt as inspector, and they did make the pipe under his direction and it was delivered.

ASSIGNMENT OF ERRORS.

The Court of Appeals erred in sustaining the action of the trial court—

1. In sustaining the demurrer to the plea of the statute of limitations (Rec., p. 6) and in admitting the contract in evidence (Rec., p. 9), and in refusing the first and second prayers offered by the defendant below (Rec., p. 53), thus holding that the contract sued upon was a specialty, whereas it was the simple contract of the District of Columbia.

2. In granting the first, second and third prayers offered by the plaintiff below (Rec., p. 52); these prayers were based on a modification of the contract, but the declaration did not count on any modification of the original contract; the court thus held that the action of covenant could be maintained on a contract under seal, modified by parol.

3. In refusing to grant the fourth prayer offered in behalf of the District of Columbia (Rec., p. 53) to instruct the jury that the District had the right to charge and deduct the penalties in the contract, if the failure to deliver the pipe at the times and in the quantities contracted for hindered and delayed the District in extending the public water service in 1887.

4. In refusing to grant the fifth prayer (Rec., p. 53) offered in behalf of the District and in holding that the plaintiff was entitled to interest on its claim.

5. In refusing to grant the sixth and seventh prayers (Rec., p. 53) offered in behalf of the District and in allowing oral evidence to be offered by the plaintiff below, without any notice to the District and without any allegation of fraud or mistake in the contract, whereby the date of the execution of the contract was changed from the date it purported to be "made and concluded" and from its date as alleged in the declaration.

POINTS AND AUTHORITIES.

I.

The contract sued on was not a specialty; it was only the simple contract of the District.

The declaration was in *covenant*, and it alleged that by certain articles of agreement, bearing date the 29th day of June, A. D. 1887, between the plaintiff corporation, the Camden Iron Works, acting through and by Walter Wood, its president, and sealed with its corporate seal, of the one part, and the said District of Columbia, acting through and by William B. Webb, Samuel E. Wheatley and William Ludlow, its Commissioners, duly authorized in that behalf, and sealed with their seals, of the other part, it was covenanted, promised and agreed upon as follows: First, the Camden Iron Works did covenant, promise and agree that it would furnish certain cast-iron pipe; and second, that the District of Columbia, acting as aforesaid, by said articles of agreement, did covenant, promise and agree to pay for said pipe certain prices, etc.; and the plaintiff says that it always from the time of making said agreement did well and truly do observe, perform and fulfill all and everything in said articles of agreement contained on its part to be done, observed, performed and fulfilled, except in so far as it was prevented or discharged from so doing by the District of Columbia, and that in the performance of said articles of agreement did furnish a large quantity of pipe, which was received by the defendant, etc., etc.

This contract, however, contains none of the apt words of a "covenant"; that word does not appear in the "articles of agreement." There was absolutely no necessity for or propriety in this agreement being a specialty. It is assumed by the learned Court of Appeals that the municipality, the District of Columbia, is like an ordinary municipality in

the matter of contracting. It declares in its opinion (Rec., p. 62) that the—

> "Commissioners are the chief executive officers of the municipal government and contracts executed by them, under their hands and seals, intended as and manifestly official acts, have the force and effect of deeds or sealed instruments, according to their import, and bind the corporation and not the individual Commissioners."

It is unnecessary to question this proposition as applied to the case of the ordinary municipality; but is the District of Columbia in this category?

We submit it is not. It does not follow that because the District had the right to adopt a seal, that therefore its then Commissioners had the right to execute, under the seal, the contract sued on in this case. The Commissioners, doubtless, had the right to execute deeds for the District under the seal of the municipality, for this is the only way such instruments can be legally executed, but here they were making an ordinary contract for the purchase of merchandise. The Commissioners were not the municipality; they had only such authority in the premises as was conferred upon them by Congress.

We do not contend that the Commissioners who signed this contract were personally liable thereon; we admit the contract bound the District, but we insist that it was and could only be bound by simple contract, and not by specialty contract. If the Commissioners had affixed to this contract the seal of the municipality, it would not have become a specialty, because their act in this respect would have been *ultra vires;* they were not authorized to make that kind of a contract.

In Dist. of Col. *vs.* Bailey, 171 U. S. 161, this honorable court, in considering the power of the Commissioners to make a contract to submit to an award, reviewed their authority to make contracts. The court examined the

statutes "from which alone the powers of the Commissioners of the District are derived." The act of June 20, 1874 (18 Stat. 116), vested in the commission there provided, the power and authority of the then governor and board of public works of the District, except as therein limited, and provided that—

> "said commission, in the exercise of such power or authority, shall make no contract, nor incur any obligation, other than *such contracts* and obligations *as may be necessary* to the faithful administration of the valid laws enacted for the government of said District," etc.

The act of June 11, 1878 (20 Stat. 102), providing a permanent form of government for the District, vested the Commissioners with the powers of the Commissioners appointed under the act of June 20, 1874, etc., and declared that they—

> "shall make no contract nor incur any obligation other than such contracts and obligations as hereinafter provided for and shall be approved by Congress."

Section 37 of the act of February 21, 1871 (16 Stat. 427), relating to the powers of the board of public works, declared that—

> "All contracts made by the said board of public works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the secretary of the District, and said board shall have no power to make contracts to bind said District to the payment of any sums of money except in pursuance of appropriations made by law, and not until such appropriations shall have been made."

This court held that this section was applicable to the present Commissioners, and cited the 15th section of the act

of February 21, 1871, by which it was provided that the legislative assembly should not—

> "authorize the payment of any claim or part thereof, hereafter created against the District under any contract or agreement made, without express authority of law, and all such unauthorized agreements or contracts shall be null and void."

The court also referred to the fact that section 13 of the Act of June 1, 1878, embodied the 2d section of the joint resolution of March 14, 1876 (19 Stat. 211), which made it a misdemeanor for any officer or person to increase or aid or abet in increasing the total indebtedness of the District; and the court said:

> "But the mere fact that the District is a municipal corporation is not decisive of the question whether or not the Commissioners of the District had power to make a contract to submit to an award, for, as we have seen, it is not the mere existence of municipal corporate being from which the power to make a submission to arbitration is deduced, but that the municipal corporation by which such an agreement is entered into has power to contract, to settle and adjust debts; in other words, all the general attributes which normally attach to and result from municipal corporate existence. Recurring to the statutes relating to the Commissioners of the District of Columbia, it is clear from their face that these officers are without general power to contract debts, or to adjust and pay the same; that, on the contrary, the statutes expressly deprive them of such power, and limit the scope of their authority to the mere execution of contracts previously sanctioned by Congress or which they are authorized to make by express statutory authority. The necessary operation of these provisions of the statutes is to cause the District Commissioners to be merely administrative officers with ministerial powers only. *The sum of the municipal powers of the District of Columbia are neither vested in nor exercised*

> *by the District Commissioners. They are, on the contrary, vested in the Congress of the United States, acting pro hac vice as the legislative body of the District, and the Commissioners of the District discharge the functions of administrative officials.* There is no authority for holding that a mere administrative officer of a municipal corporation, simply because of the absence of a statutory inhibition, has the power, without the consent of the corporation speaking through its municipal legislative body, to bind a corporation by a common law submission. . . . (178). Whilst the fundamental want of power in the District Commissioners to agree to a common law submission is decisive, there is another view which is equally so. By the express terms of the statute the Commissioners are forbidden to enter into any contract binding the District for the payment of any sum of money in excess of $100, unless the same is reduced to writing and is recorded in a book to be kept for that purpose, and signed by all the Commissioners, the statute declaring, in express terms, that no contract shall be valid unless recorded as aforesaid. This mandatory provision of the statute clearly makes the form in in which a contract is embodied of the essence of the contract. In other words, by virtue of the restrictions and inhibitions of the statute a contract calling for an expenditure in excess of $100 can not take effect unless made in the form stated. The form, therefore, becomes a matter of fundamental right, and illustrates the application of the maxim *forma dat esse rei.*"

If the Commissioners may not increase the indebtedness of the District, by what process of reasoning can it be claimed that they may enlarge the legal liability of the District by *unnecessarily* extending that liability from three years to twelve years? A contract *under seal* was impliedly prohibited by the act of June 20, 1874, because it was not such a contract as was "*necessary* to the faithful administration of the valid laws."

Congress authorized and directed the Commissioners to

make a contract in writing—not a contract in writing under seal. Where can be found any authority for Captain Symons or Colonel Ludlow to waive the provisions of the contract of the Camden Iron Works with the District of Columbia? Where can be found their authority to make a new contract with the Camden Iron Works, especially to make a new contract under seal?

It will be observed that the declaration (Rec., p. 1), does not aver that the contract was sealed by the Distr ct or that it was under its seal; the averment is that the contract was sealed with the seals of the Commissioners; under such an averment a sealed contract of the District was not admissible in evidence. The plaintiff below was charged in law with knowledge and notice that the powers of the Commissioners were limited and that they could not make a specialty contract for the District. It is quite apparent, too, that such a specialty on the part of the District was not within the contemplation of the parties, for the contract is thus executed formally and deliberately under its seal by the Camden Iron Works and it is not thus executed by the District.

But it is said that the private seals of the Commissioners are attached to the contract which purports to be the contract of the District, and therefore it becomes the specialty contract of the municipality.

We deny that this would be the effect even if the contract was that of a private corporation; for being the only organ by which a body corporate can obligate itself by deed, a contract on behalf of the corporation by an agent, who affixes his private seal, has the effect of binding the corporation only by *simple contract.*

Bank *vs.* Guttschlick, 14 Pet. 29.
Tiedeman Munic. Corp., 165.
1 Dill. Munic. Corp., Sec. 452.
21 Am. & Eng. Encyc. Law, 910, and cases.
Ibid (2d Ed.), 1040 and 1041.

The deed of a corporation is invalid, if executed in the name and under the seal of its officers.

The use of a seal by the corporation is only necessary where its use would be required by an individual.

4 Am. & Eng. Encyc., 241 and cases; 242 and cases.

A corporation was anciently held to be able to act only by its seal. That idea has been abandoned, but it may still use the seal in deference to the ancient rule, as a means of evidencing its assent to a simple contract. And the use of a seal, where none is required, does not raise the contract to the dignity of a specialty or prevent assumpsit instead of covenant being maintained thereon.

Thomson on Corporations, Sec. 5053.
Bank *vs.* Railroad Co., 5 S. C. 156.
Levering *vs.* Mayor, 7 Hump. (Tenn.) 552.
Clark *vs.* Read, 12 App. D. C. 343.

Where duly appointed officers or agents, acting within the scope of their authority, execute an instrument on behalf of a corporation, signing their own names and affixing their own seals, such seals are merely *nugatory*, and the instrument is to be regarded as a simple contract; and, if otherwise valid, binding on the corporation as such.

Regents of University *vs.* Detroit, etc., 12 Mich. 138.
Blanchard *vs.* Blackstone, 102 Mass. 343.
Burrill *vs.* Boston, 2 Cliff. (C. C.) 590.

An instrument purporting to be the deed of a corporation and executed in its name by its president, with the word "seal" at the end of the signature, is not effective as the deed of the corporation, either at common law or under Sec. 685 of the Code. Such deed is only the *personal act of the president*, and is not admissible in evidence to prove a conveyance by the corporation.

Caldwell *vs.* Morgantown Co., 121 N. Car. 339.

A deed purporting to be the deed of a corporation authorized by law to have and use a common seal, which is not sealed with the corporate seal, is *void.*

Danville Seminary *vs.* Mott, 136 Ill. 289.

> "The instrument bears not the corporate seal, consequently, at common law, had the parties been reversed, no action for *covenant broken* could have been maintained against these plaintiffs."
>
> Orphan Asylum *vs.* Johnson, 43 Me. at 184.

> "It seems that although because of the absence of the corporate seal the corporation might not have been liable in a technical action of *covenant*, it was liable in an action of *assumpsit* for use and occupation."
>
> Whitford *vs.* Laidler, 94 N. Y. 145.

A corporation can only execute a formal bond with its *corporate seal*, countersigned by an officer entitled to affix its seal.

Mo. Land Co. *vs.* Jeffries, 40 Mo. App. 360.

An agent or attorney of a corporation, in executing a deed in its name, must, in order to make it the act and deed of the corporation, affix thereto the *corporate seal.*

Savings Bank *vs.* Davis, 8 Conn. 181.

In strictness a deed of conveyance by a corporation must be executed not only by using the corporate name in the body of the deed, but it must be *sealed with the corporate seal.* From this it follows that a deed describing the grantor as a corporation, but which is executed by the president thereof, in his own name, and under his own seal, and describing him as president, will not pass title from the corporation; and unless the seal of the corporation is affixed to the instrument, it will not support a common law action of

covenant, although sealed with the private seal of the agent of the corporation executing it; and it has been held, where the deed was thus executed, that, although the corporation may have authorized the committee to contract, and may therefore be liable in *some form of action*, yet *covenant* is not the proper remedy.

Thompson on Law of Corp., Par. 5080 and cases cited.

In the case of Randall *vs.* Van Vechten et al., reported in 19 Johns. Rep. 60, it was held that—

> "Where the defendants, describing themselves as a committee of the corporation of the city of Albany, entered into a written contract with the plaintiff, under their respective hands and seals, for a survey of the city, &c., and the corporation had recognized their authority to make the contract, that the defendants were not liable to the plaintiff in their individual capacities, but that an action of *assumpsit* would lie against the corporation, for, the contract not being under their *corporate seal*, *covenant* would not lie against them; and it makes no difference, in regard to a corporation, whether the agent is appointed under seal or not, or whether he puts his own seal to the contract he makes in their behalf."

And this court approves the doctrine laid down in the foregoing case in the following language:

> "Nor have we any doubt but that the action well lies against the bank, for, although the agreement is under seal, it is not the seal of the corporation, but that of the president and cashier. It was decided in the case of Randall *vs.* Van Vechten, 19 Johns. Rep. 60, that *covenant* would not lie against a corporation on a contract not under their *corporate seal*, but that an action of assumpsit would lie; and that it makes no difference, in regard to a corporation, whether the agent is appointed under seal or not, or whether he puts his own seal to a contract which he makes in their behalf, the doctrine of merger not applying to

such a case. This doctrine we approve, and it is decisive of the objection."

Bank of Metropolis *vs.* Guttschlick, 14 Peters, 29.

"Another objection," says this court, "is, that as the agreement of 1807 is sealed, and is connected by reference with the prior agreement, they are to be construed as one sealed instrument, and *assumpsit* will not lie upon an instrument under seal. The foundation of this objection utterly fails, for the agreement is not under the *seal of the corporation*, but under the *seals of the committee*."

Bank of Columbia *vs.* Patterson's Admr., 7 Cranch (U. S.) 299.

The private seals of a committee, professing to act for a corporation, are not the seals of the corporation; and although the corporation may have authorized the committee to contract and, may therefore, be liable in *some form of action*, yet *covenant* is not the proper remedy. An action of covenant can only be maintained against a person who has executed a deed *under seal*.

Mitchell *vs.* President, etc., Land Co., 4 Fla. 200.

To bind a corporation by specialty, it is necessary that its corporate seal should be affixed to the instrument—the private seal of an agent, fully authorized to enter into a contract on the part of the corporation, would not have that effect; and so an action of *covenant* will not lie against the State upon a contract entered into by her agents and sealed with their private seals.

State *vs.* Allis, 18 Ark. 269.

The Cases Relied on by the Defendant in Error are to be Distinguished from the Case at Bar.

The case of Jacksonville, &c., Railway *vs.* Hooper, 160 U. S. 14, bears no resemblence to the case at bar. There the

lease was *signed in the name of the corporation* by its president, with a seal attached. The original lease was not offered in evidence; a certified copy and the duplicate lease were admitted in evidence. The court said (p. 518):

> "*But in the absence of evidence* to the contrary the scroll or rectangle containing the word "seal" will be deemed to be the proper and common seal of the company. A seal is not necessarily of any particular form or figure. . . . Whether an instrument is under seal or not is a question for the court upon inspection; whether a mark or character shall be held to be a seal depends upon the intention of the executant, as shown by the paper. The defendant did not produce the original in order that it might be compared in the particular objected to with the copy and duplicate offered. The defendant's attorney, Mr. Buckman, was called, and testified that he was one of the attesting witnesses to the instrument offered, and that he, as a notary public, took the acknowledgement thereto of Alexander Wallace; that he executed the same for and in behalf of the company, and that the said lease was the act and deed of the defendant company for the uses and purposes therein expressed. Whether, therefore, the instrument put in evidence was merely a copy, in which event it would not be expected that a wax or stamped seal of the company would appear upon it, but merely a scroll, representing the original seal, or whether the so-called copy was really the original paper, as certified by one of defendant's witnesses, would not, in our opinion, be material. The presumption would be, if the paper were a copy, that the original was duly sealed, or, if it were the original, that the scroll was adopted and used by the company as its seal, for the purpose of executing the contract in question."

The cases relied on by the defendant in error concerning the adoption and use of a seal have no relevancy to such a limited municipal corporation as the District of Columbia; moreover, they relate to private corporations and individuals, and sovereign States.

In Sheetz *vs.* Selden, 2 Wall. 177, the deed was executed by the Governor and auditor of Indiana and *bore the seal of the State.* The expression in the opinion referred to by the trial court (Rec., p. 45) does not relate to the question of whether the State would be bound in *covenant* under such an execution, but whether the contract is that of the individuals signing or of the State. This is made plain from the cases cited by Justice Field in the opinion. 1 Cranch, 345; 1 Greenleaf, 231; 15 Cal. 456. It can not be claimed that the Supreme Court of California held otherwise, for in Richardson *vs.* Scott River Co., 22 Cal. 150, it said:

> "A conveyance of real property by a corporation must be under its *corporate seal.* It may alter its seal at pleasure, and may adopt as its own the private seal of an individual, but in the latter case the seal adopted must be used as that of the corporation. If to a deed, purporting to be that of a corporation, a seal be affixed as that of the *individual agent who signs it,* such seal can not be treated as that of the corporation."

II.

Covenant Cannot Be Maintained on a Contract Under Seal Modified by Parol.

The demurrer to the defendant's plea of the statute of limitations reached back through the whole record, and raised the question whether the declaration was good.

Clearweather *vs.* Meredith, 1 Wall. 25.

The averment of the declaration was (Rec. p. 2):

> "And the plaintiff corporation in fact says that it always from the time of making said agreement did well and truly do, observe, perform and fulfill all and everything in said articles of agreement contained on its part to be done, observed, performed and fulfilled, *except in so far as it was prevented or discharged from so doing by the defendant,* and that in the performance of said articles of agreement it did furnish and deliver to the defendant the pipe," etc.

It will be observed the plaintiff does not aver performance of the alleged contract, but sets up a modification thereof and a performance of the modified contract. Covenant can not be maintained on a contract under seal, the material part of which is subsequently varied by parol agreement. The remedy is on the substituted agreement.

McVoy *vs.* Wheeler, 6 Port. Ala., 201.
Raymond *vs.* Fisher, 6 Mo., 29.
Vicary *vs.* Moore, 2 Watts., 451.
Ellmaker *vs.* Franklin Ins. Co., 6 W & S., 443.
Heard *vs.* Wadham, 1 East., 630.
Littler *vs.* Holland, 3 T. R. 590.

Where the defendants covenated to pay for work that should be done with their written assent, if such written assent be dispensed with by parol, covenant will not lie. *To bring down a covenant to parol in the declaration is to defeat the action.*

Lehigh Coal Co. *vs.* Harlan, 27 Penna. St. 429.

If a person enters into a bond for the performance of certain matters and afterwards a parol agreement is made between the parties, varying the time of performance, an action cannot be maintained upon the bond for the penalty; but the plaintiff must seek his remedy upon the agreement enlarging the time for performance.

Ford *vs.* Campbell, 11 N. J. L. 387.
Jewell *vs.* Schroeppel, 4 Cow. 564.
Carrier *vs.* Dilworth, 59 Penna. St. 406.

An action will not lie on a contract not performed in time, but recovery may be on *quantum meruit.*

Slater *vs.* Emerson, 14 How. 239.
Ingle *vs.* Jones, 2 Wall. 1.
Dermott *vs.* Jones, 23 How. 223.

Where it is necessary on the part of the plaintiff to aver performance, it must be set forth with such certainty as to enable the court to judge whether the intent of the covenant has been fulfilled. There was no sufficient averment here.

Thomas *vs.* Van Ness, 4 Wend. 549.
1 Chitty Pleading, 325.

An allegation of an original contract does not let in evidence of its modification.

Lainitz *vs.* King, 93 Mo. 513.
Fallon *vs.* Lawler, 102 N. Y. 228.
Henning *vs.* U. S. Ins. Co., 47 Mo. 425.
Pharr *vs.* Bachelor, 3 Ala. 237.
Buchanan *vs.* Beck, 15 Ore. 563.
Salter *vs.* Ham, 31 N. Y. 321.

A declaration on an express contract, alleging performance, does not let in evidence of an excuse for non-performance.

Colt *vs.* Miller, 64 Mass. 49.
Palmer *vs.* Sawyer, 114 Mass. 1.
Purdue *vs.* Noffsinger, 15 E. D. Smith, 386.
Bernard *vs.* Wash. Life Ins. Co., 40 Iowa, 442.
Fauble *vs.* Davis, 48 Iowa, 462.

Nor under such declaration can excuse be shown in rebuttal, where plaintiff's non-performance is set up as a defense as in this case.

Iseman *vs.* Hawkeye, etc., 74 Iowa, 11.
Boon *vs.* State Ins. Co., 37 Minn. 426.
Potts *vs.* Land Co., 47 N. J. L. 476.

As plaintiff must allege and prove performance, a general denial lets in evidence of breach.

Coverly *vs.* McOwen, 123 Mass. 574.

There were two material changes in the contract as claimed by the plaintiff; and without these changes the plaintiff "would not have done anything further under the contract" (Rec., p. 35), viz.: First, that no penalties whatever should be imposed; second, that the time for performance should be indefinitely extended. Phillips Const. Co. *vs.* Seymour et al., 91 U. S. 646, does not rule this question, for in that case there was no new contract, and this court held explicitly there could be no recovery for work done under the parol agreement in connection with the contract.

III.

The defendant's first prayer (Rec., p. 52) is based on the fact that there was a modification of the contract with reference to the time of delivery of the pipe contracted for. The plaintiff having failed to declare on the modification of said contract, this prayer was inapplicable to the case and should have been refused.

IV.

The plaintiff's second and third prayers are in the same category with its first, and should have been refused for the same reasons. The third prayer assumed that the plaintiff would not have delivered the pipe to the defendant except upon the modification of the contract. This question should have been left to the jury to find as a matter of fact.

V.

The jury should have been told that there could be no recovery against the defendant in this action, based upon the contract of June 29, 1887. No pipe was delivered within the contract term. If there could be any recovery on said contract, it could only be for pipe delivered within the 136 days, the contract time, the action being based on the special contract, and not otherwise.

VI.

The jury should have been instructed that the plaintiff was not entitled to recover in this action the price of iron pipe delivered to the defendant after November 10, 1887, because, that being the end of the contract time, any pipe that was delivered after that time could not have been the subject of recovery under the special contract declared on.

VII.

The court having admitted in evidence the contract declared on, the jury should have been told that upon the failure of the plaintiff to deliver the iron pipe therein mentioned at the times, and in the quantities specified, the defendant had the right to charge against the price it had agreed to pay the plaintiff for said pipe, as liquidated damages, the penalties provided for in the contract.

Emack *vs.* Campbell, 27 Wash. Law Rep. 214.

VIII.

The Plaintiff was Guilty of Laches, and was Not Entitled to Interest on its Demand.

The plaintiff having unreasonably delayed to bring its suit, the jury should have been instructed that it was not entitled to interest on its claim prior to the institution of the suit, if it was entitled to recovery at all. The plaintiff acquiesced in the settlement of the account, abandoned its claim against the defendant, and appealed to Congress for relief (Rec. p. 39); it should not thus be allowed to secure a continuing interest-bearing investment. The contract did not stipulate for interest. Congress has not declared that any interest shall be chargeable on District contracts, except that judgments on such contracts shall bear 4 per cent. interest.

At common law interest was not allowed; it is the creature of statute alone. A municipal corporation is created for public purposes and with limited powers; and it has been held that where it is not named in the act regulating interest, it is not liable for interest.

City of Pekin *vs.* Reynolds, 31 Ill. 529.

It is never allowed when the delay is the result of the mere failure of the creditor to press the collection of his claim.

Adams Exp. Co. *vs.* Milton, 11 Bush. 49.

But where interest is recoverable, not as part of the contract, but by way of damages, if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim, it may be properly withheld.

Redfield *vs.* Iron Co., 120 U. S. at 176.
U. S. *vs.* Sanborn, 135 U. S. 271.
Redfield *vs.* Bartels, 139 U. S. 694.

IX.

The Defendant in Error was not Entitled to Prove that the Contract Sued on was Executed at a Time Different From the Date Thereof Without Notice or Allegation Thereof in the Pleadings.

The declaration alleged that

> "Whereas by certain articles of agreement, *bearing date* the 29th of June, A. D. 1887, between the plaintiff corporation, acting through and by Walter Wood, its president, and sealed with its corporate seal of the one part, and the said District of Columbia, acting through and by William B. Webb, Samuel E. Wheatley and William Ludlow, its Commissioners, duly authorized in that behalf and sealed with their seals, of the other part, it was covenanted, promised and agreed upon as follows:"

The contract offered in evidence read: "This contract made and *concluded* this 29th day of June, 1887," etc.

The jury should have been instructed that the plaintiff was not entitled to show that the contract was executed on any other day than that named therein.

X.

The jury should have been instructed that under the contract given in evidence by the plaintiff the time within which the iron pipe specified therein was to be delivered was to be computed from the date of the execution of that contract as the same appeared upon its face.

In the "general conditions" of the contract was the provision (Rec. p. 15) that:

> "All work must be commenced within.....days, and completed within 136 days after the date of the execution of the contract; if not so completed, the pay of all inspectors employed on the work after the time fixed for its completion will be charged against and deducted from any money that may be due or become due the contractor, as well also the sum of ten dollars ($10.00) per diem for the same period, estimated as liquidated and fixed damages to the District, arising from failure to complete the work at the time specified, time of completion of the contract being an essential element and consideration.',

The court below held that the phrase, "after the date of the execution of the contract," did not refer to its date, but to the time when it was finally signed by all of the Commissioners, and that time was not of the essence of the contract.

> "Ordinarily," says Prof. Greenleaf, 2 Ev., Sec. 14, "in stating an instrument or other matter in pleading it should be set forth not according to its *terms* or its *form*, but according to its *effect in law*, for it is under its latter aspect that it is ultimately to be considered."

Again, at section 14, the author says:

> "On the other hand, it will not always suffice to adhere to the *literal terms* of the instrument in setting it forth in the declaration, for sometimes the true interpretation of the instrument itself may lead to a result totally different from the intendment of law upon the face of the declaration."

The plaintiff should have declared on the contract according to its legal effect, in order to entitle it to the benefit of showing that it was executed on a day other than that which the contract itself declared it was "made and concluded," or made proper averments in the declaration.

The date of a writing is that part which purports to specify the time when it was executed.

8 Am. & Eng. Encyc. (2d Ed.), 727.

Where time or place or any other circumstance is material, the plaintiff can not vary from his previous statement of it.

Chitty Plead. 648, 538, 644.

Without any notice to the defendant, by the pleading, or otherwise, and without any allegation of fraud or mistake, the plaintiff was allowed to offer evidence fixing the date of the execution of the contract different from the time it professed to be executed.

When the parties to a written agreement have made the date of the instrument a material part of the contract, as when the time of performance is fixed with reference to it, oral evidence is not admissible to vary or change it.

Joseph *vs.* Bigelow, 4 Cush. 82.
Huston *vs.* Young, 33 Me. 85.
Story Prom. Notes, (6 Ed.), Sec. 85.

The penalties and liquidated damages were very properly inserted in such a contract as the one in suit. The pipe, as

the plaintiff well knew, was intended for water-main service; and the uncontradicted testimony was (Rec. p. 42)—

> "That a great deal of building was going on in the District in 1887, and great need for the pipe called for under that contract—"

And (Rec. p. 43)—

> "That many people in the District were suffering for water, and the failure of the plaintiff to deliver the pipe contracted for was a matter of great annoyance and inconvenience to the people of the District, as well as a source of great expense to them, that so decided was the necessity for the pipe contracted for that it was deemed proper to purchase a quantity of such pipe wherever it could be found in open market and charge the excess of cost over the contract price to the plaintiff."

The plaintiff on its part, probably having a better market elsewhere (Rec. p. 36)—

> "Made no particular haste to deliver the pipe which had been cast and inspected and it was shipped as schooners could be conveniently chartered."

The admission of this oral testimony entirely *destroyed the provisions of the contract respecting penalties.* No notice of any such purpose was anywhere or in any way given, so that the District might be prepared to meet it; and when the case was tried (Rec., p. 41), Col. Ludlow, the Engineer Commissioner during the contract period, was absent in Havana.

It is respectfully submitted that there is error in the record, and that the judgment of the court below should be here reversed.

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No. 172.

Brf. of Maddox for D. & C.

Office Supreme Court U.S.
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Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 172.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

CAMDEN IRON WORKS.

ARGUMENT AND BRIEF IN BEHALF OF DEFENDANT IN ERROR.

SAM'L MADDOX,
Attorney for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1-28-'01

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 172.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

CAMDEN IRON WORKS.

Statement of Facts.

This is a writ of error which seeks to reverse a judgment recovered by the Camden Iron Works, a corporation having its principal office in Philadelphia, for a balance due by the District of Columbia for certain iron pipe manufactured and delivered under and in accordance with a contract, in writing, in that behalf duly made and signed.

The contract in question was prepared in the office of the District Commissioners, most of it being printed. It purported to be between the District of Columbia and the Camden Iron Works. The words "District of Columbia" in the introductory clause are in print. The attestation clause, all in print, is as follows:

"In witness whereof, the undersigned, William B. Webb, Samuel E. Wheatley, and William Ludlow, Commissioners of the District of Columbia, appointed under the act of

Congress entitled 'An act providing a permanent form of government for the District of Columbia,' approved June 11, 1878, and the party of the second part to these presents have hereunto set their hands and seals the day and year first above written.

" ——— ———, [L. S.]
" ——— ———, [L. S.]
" ——— ———, [L. S.]
" *Commissioners of the District of Columbia.*"

Without being signed by any official of the District, and with the date left blank, it was forwarded for execution by mail to the contracting company at Philadelphia. On the 29th of June it was signed and formally executed by the Camden Iron Works, the corporate seal of the company being affixed, and mailed the same day to the Commissioners of the District. The letter transmitting the contract bears date the same day (R., p. 21).

After waiting thirteen days, the contract not having been in the meantime returned, the treasurer of the company wrote to Colonel Ludlow, the then Engineer Commissioner, asking for its return by "return mail" (R., p. 22). Ten days later the company wrote again for the contract, in part as follows:

"We shall be ready to start making them (the pipe) very soon, but, of course cannot do so until we have the proper papers" (R., p. 23).

Nor was the contract received back by the company until the 4th day of August, and then it did not bear the signature of Mr. Webb, one of the Commissioners (R., p. 34).

The contract provided for the manufacture of certain iron pipe and its complete delivery "within 136 days after the date of the execution of the contract" (R., p. 15), one-half of each size to be delivered on or before September 25, 1887, the remainder on or before November 10, 1887 (R., p. 13).

For failure to deliver within the time thus fixed the contract provided that there would "be deducted from the con-

tract prices, as herein specified, one per cent. of the contract price for all delinquent articles for each and every week day that they remain delinquent" (R., p. 13). There was a further provision that for failure to complete the work at the time specified, there should be deducted from the money to become due under the contract "the sum of ten dollars ($10) *per diem* for the same period estimated as liquidated and fixed damages to the District" (R., p. 15). Both of these provisions were in print.

The contract also provided for the appointment of inspectors, though it did not say by whom they should be appointed, whose duty it was to point out to the contractors "any neglect or disregard of the specifications" (R., p. 15), but their decision was not final; that was remitted to the Engineer Commissioner (R., p. 14).

Payments were to be made after August 1 for all pipe "received and accepetd in proper order and condition, * * * less 20 per cent. of the amount found due, to be reserved until the satisfactory completion of the contract" (R., p. 13).

Immediately upon the receipt of the contract on August 4 the contractors made ready to cast the pipe as required by the specifications. About one-third of the quantity required was cast during the month of August and the early part of September (R., p. 41). The contracting company notified Colonel Ludlow, in a letter dated August 4, that they would be ready for an inspector about August 12. In the same letter, Mr. Wood, president of the company, notified the Commissioners that if it was their intention to send on Mr. Hoyt as an inspector it would be necessary to waive the dates of delivery specified in the contract (R., p. 23). Several letters passed between the parties on the subject of Hoyt's appointment, and finally, on September 5, Mr. Wood said, in his letter of that date, "He is not a proper man for the position" (R., p. 26).

Thereupon, and after it appeared that the District officials

insisted upon having Hoyt inspect and pass upon the pipe, work on the Washington pipe was stopped and the pipe then cast, in part performance of the contract, was sold to other parties (R., p. 34).

Mr. Wood objected to Hoyt because he rejected as defective so many pipes that were entirely in accordance with the specifications. This made it impossible for the contractor to perform the contract in the short time given for that purpose (R., p. 24).

After the company had concluded to abandon the contract, and somewhere between the 10th and 15th of September, Colonel Ludlow, unsolicited, went to see Mr. Wood at his office in Philadelphia. The matter was talked over in a friendly way, and Mr. Wood was given to believe that if the objection to Hoyt was withdrawn, no penalties for delay in delivering would be charged. Thereupon Mr. Wood requested Hoyt's immediate return; but he did not arrive till the 17th of October, causing a further delay of 33 days (R., p. 35).

In their letter of June 22 Mr. Wood suggested a change in the method of casting the 3″ pipe, which he thought would give better results than if cast strictly in accordance with the specifications. This led to correspondence back and forth, the last letter on the subject by Captain Symons, assistant to the Engineer Commissioner, saying, " If I can get away I will come over perhaps next week, and possibly then the change may be authorized " (R., p. 31); but under date November 1 he wrote again to say that the 3″ pipe must be made in accordance with contract specifications (R., p. 32).

Work was begun again by the company immediately upon the return of Hoyt; but out of 2,726 lengths of pipe inspected by him he rejected 435, or nearly one-sixth, that were perfectly good and were sold to other parties at full prices (R., pp. 35, 40, and 41).

But a small proportion of the pipe was delivered prior to the 30th day of November. On that day Captain Symons

wired the company to know if they would consent to a cancellation of the contract, *quoad* the remaining 12″ pipe. On the same day he wrote in explanation: "The question of available funds is the only and sole question involved" (R., p. 33). Mr. Wood replied, consenting to the proposed cancellation, provided that all pipe then cast should "be taken and paid for at the regular contract price, without any deduction" (R., p. 32). On December 2, Captain Symons wrote, by direction of the Engineer Commissioner, that only pipe then manufactured would be received, and the company was requested to "send on and deliver the pipe which is now made and accepted by the inspector" (R., p. 34).

After December 1 pipe worth $11,404.09 at contract rates was delivered to and accepted by the District. None of it would have been sent if Mr. Wood had supposed that fines and penalties would be charged as for delays in delivery. No particular haste was manifested in these latter deliveries because of Captain Symons' letter saying that the pipe could not be laid till a further appropriation by Congress. The last consignment was delivered February 27, 1888. All the pipe called for by the contract was actually delivered except what the Commissioners declined to receive.

The total value at contract rates of all pipe delivered was $16,335.87, on which there was paid in cash $5,291.71 by two checks, which did not indicate that they were meant to be in full settlement of all moneys due under the contract. The balance, $11,044.16, was charged as fines and penalties for not delivering the pipe within the time specified in the contract. The fines charged against the consignment of pipe delivered February 27 exceeded by $529.83 the value of that consignment at contract prices (R., p. 19).

On receipt of a statement of account, made up in the office of the District auditor, showing fines and penalties about equaling the value of all the pipe delivered after December 1, the company protested against this plan of payment. Officers of the company made several trips to Wash-

ington, and on one of them Mr. Wood was referred to Colonel Ludlow, who had ceased to be a District Commissioner and was then in Detroit. He went twice to Detroit to see him, but Colonel Ludlow declined to make any recommendation in the matter. Correspondence followed, the last letter on the subject by Mr. Wood to the Commissioners bearing date November 10, 1892. In reply to this the Commissioners wrote finally declining to readjust the account and advising the company to apply to Congress for relief (R., p. 39).

This was done in the following February, Mr. Wood supposing that it was a matter of routine and that the Commissioners would look after the bill and recommend its passage. After waiting a year and more for Congress to act, the company gave up all hope of securing a settlement out of court, and counsel was retained to bring suit in the spring or early summer of 1894. The suit was begun February 26, 1895.

The plaintiff in error relied upon no fact by way of meritorious defense to the action. Captain Symons testified as a witness that he visited the Millville foundry during the progress of the work and examined some of the pipes rejected by Hoyt. He found them "eccentric," but did not know whether or not they were part of the pipe rejected by Miller, the inspector of the contracting company, and afterwards broken up (R., p. 43). He did not notify any official of the company of his intended visit. Hoyt was not produced as a witness. No evidence was adduced tending to show pecuniary loss to the District by reason of delay in delivering the pipe. It was not disputed that pipe worth, at contract prices, $11,044.16 was passed by Inspector Hoyt, delivered to the District, and used in the extension of the water service, but never paid for.

POINTS AND AUTHORITIES.

I.

The contract sued on in this action is a sealed instrument and was intended so to be by all the parties to it.

A seal is not necessarily any particular form or figure; any mark or sign indicating an intention to seal is sufficient.

"The world has outgrown the necessities of an age when men made their seals because they could not write. What then from necessity attested the very act of execution and the genuineness of it is now but a mere arbitrary form, through which, however, special obligations still attach in support of the well-recognized distinction between contracts which are sealed and those which are not.

"A seal is not necessarily any particular form or figure. When not of wax, it is usually made in the form of a scroll, but the letters 'L. S.' or the word Seal inclosed in brackets or in some other design are in frequent use. It may, however, consist of an outline without any inclosure. It may have a dark ground or a light one. It may be in the form of a circle, an ellipse, or a scroll, or it may be irregular in form. It may be a simple dash or flourish of the pen.

"Whether the instrument is under seal or not is a question to be determined by the court upon inspection; and whether or not any mark or impression shall be held to be a seal depends wholly upon the intention of the party executing the instrument, as exhibited upon the face of the paper itself."

Dash "——" following signature held to be a seal.

Hacker's Appeal, 121 P. St., 192.

Approved in 160 U. S., 519.

"It is not necessary that an impression should be made with wax or with a wafer. If the seal, stick, or other instrument used be impressed by the party on the plain parch-

ment or paper, with an intent to seal it, it is clearly sufficient, and, therefore, where the instrument is a deed and properly stamped, and it is stated in the attestation to have been sealed and delivered in the presence of the witnesses, it will, in the absence of evidence to the contrary, be presumed to have been sealed, although no impression appears on the parchment or paper."

Sugden on Powers, vol. 1, star page 283.

In Bowman *vs.* Robb, 6 Pa. St., 302, the letters "L. S." inclosed in a circle were opposite a line midway between the signatures of two makers of a note, which concluded "Witness our hands and seals." Held that the seal applied to both.

"The object of a seal is to give character to the instrument, and enable it to be distinguished and recognized for that which it was intended to be. This is as well effected by a scrawl with a word seal written within it, or with the initials 'L. S.,' a common mode resorted to in copying sealed instruments.

Hastings *vs.* Vaughn, 5 Cal., 318.

"The act of signing in front of a device (seal) is an adoption by the signer of that device as his seal. To hold that parties executing such instruments do not adopt such printed devices as their seals by signing their names in front of them would lead to disastrous consequences."

Osborn *vs.* Kistler, 35 Ohio St., 102.

Any letters, such as "L. S.," or a circumflex scroll made by a party in connection with the words "sealed" or "Witness my hand and seal," or approved by evidence *aliunde* to have been intended as a seal, will constitute a valid seal.

McKain *vs.* Miller, 1 McMullan Law (S. C.), 312.

The court says:

"Any stamp, impression or mark made or adopted by the signer to a written contract, and annexed to his signature *as and for his seal*, would seem to answer the purpose of sealing in order to render the contract a sealed instrument."

* * * "Whenever the intention to seal is so plain the jury are warranted in inferring that the signer fulfilled his intention, practically, by adopting the printed L. S. as his promised seal."

In 20 Ills., 389, it was held that assumpsit would not lie against the makers of a note who signed their name in front of the sign (—); that it was a sealed instrument.

We feel warranted by common sense, by justice and sound reason, as well as by the principles of law, to presume that all the signers of an instrument indicating upon its face an intention to seal it adopted any seal or scrawl that may be annexed to the name of one. The obligors will be left to rebut that presumption by plea and issue.

Davis *vs.* Burton, 3 Scammon, 41.

In the District of Columbia a printed seal at the end of a signature is sufficient to make the instrument a specialty. "No hesitation in saying so," says Judge Cox.

Green *vs.* Lake, 2 M., 162.

"It is time that such objections to the validity of seals should cease."

Pillow *vs.* Roberts, 13 Howard, 474.

The District of Columbia is a municipal corporation unique in its nature. The details of management and government are entrusted to three Commissioners. They have power to make contracts binding upon the District, with the single restriction that if the amount involved exceeds $100 the contract must be signed by all three of them. They are officials of the United States, being appointed by the President and confirmed by the Senate. The United States therefore govern the District of Columbia through its agents, the Commissioners.

Metr. R'w'y Co. *vs.* D. C., 132 U. S., 9.

The present form of government was established by an act of Congress approved June 11, 1878. Though authorized to have a seal, no formal action looking to the adoption of any device as a seal was taken until September 23, 1887, three months after the contract sued upon was prepared for execution. The attestation clause being in print, and it being the manifest intent to make the contract an instrument under seal, we must infer that this form of attestation and seal were adopted and in universal use as the seal of the municipal corporation.

It is well settled that a corporation may adopt and use any seal it chooses, for the time, as an individual.

Bank *vs.* Rutland, etc., R'w'y Co., 30 Vt., 171.
Milldam Foundry *vs.* Hovey, 21 Pick., 428.
Ransom *vs.* Stoughton, 13 N. J. Eq., 212.
S. Baptist Society *vs.* Clapp, 18 Bar., 36.

"If an agent of a corporation have authority to make a mortgage, and affixes thereto anything which the law recognizes as a seal when affixed by a natural person, it will be a good execution presumptively by the corporation."

Johnston *vs.* Crawley, 25 Geo., 316.

This point has been conclusively set at rest by this court in a series of decisions. The first of the cases is—

Hodgson *vs.* Dexter, 1 Cranch, 345.

This was an action of covenant brought by Joseph Hodgson against Samuel Dexter, late Secretary of War, for not keeping in good repair and for not delivering up in like good repair at the end of the term certain premises which had been leased by the plaintiff to the defendant for the purpose of offices for the War Department, the building having been entirely destroyed by fire during the term.

The lease purported to be made by the lessee as Secretary of War and under his hand and seal.

In deciding the case the court, by Mr. Chief Justice Marshall, say:

"It is too clear to be controverted that where a public agent acts in the line of his duty and by legal authority, his contracts made on account of the Government are public and not personal. They enure to the benefit of, and are obligatory on, the Government, not the officer. A contrary doctrine would be productive of the most injurious consequences to the public as well as to the individual.

"The court is unanimously of the opinion that this contract was entered into entirely on behalf of the Government, by a person authorized to make it, and that its obligation is on the Government only."

"It may be stated generally that when a deed is executed or a contract is made on behalf of a State by a public officer duly authorized, and this fact appears upon the face of the instrument, it is the deed or contract of the State, notwithstanding that the officer may be described as one of the parties and may have affixed his individual name and seal. In such cases the State alone is bound by the deed or contract and can alone claim its benefits."

Sheets *vs.* Selden's Lessee, 2 Wall., 187.

See also Eureka Co. *vs.* Bailey Co., 11 Wall., 488.

The latest decision on the subject is Jacksonville, &c., R'w'y Co. *vs.* Hooper, 160 U. S., 514.

Declaration in covenant on a lease. The *testimonium* clause was:

"In witness whereof the parties hereto have hereunto set their hands and seals this the day and year above written."

JACKSONVILLE, &C., CO.,
By ALEX. WALLACE, *President.* [SEAL.]

Demurrer that there is no seal of the company to said paper.

Held sufficient on demurrer.

Third and fourth assignments of error, that it was error to put in evidence the duplicate lease, because they were not

shown to be under the seal of the company, but appeared to be under the private seal of the president.

"But in the absence of evidence to the contrary, the scroll or rectangle containing the word 'seal' will be deemed to be the proper and common seal of the company. A seal is not necessarily of any particular form or figure.

"Whether an instrument is under seal or not is a question for the court upon inspection; whether a mark or character shall be held to be a seal depends upon the intention of the executant, as shown by the paper.

"The presumption would be, if the paper were a copy, that the original was duly sealed, or, if it were the original, that the scroll was adopted and used by the company as its seal for the purpose of executing the contract in question."

Throughout the several States of the Union the reports abound in well-considered cases, holding that a contract such as that sued on in this action is the *covenant* of the corporation. A few only of these will be noticed.

"Where a contract is entered into, or a deed made, in behalf of the Government, by a duly authorized *public* agent, and the fact so appears, notwithstanding the agent may have affixed his own name and seal, it is the contract or deed of the Government, who alone is responsible, and not of the agent."

Stinchfield *vs.* Little, 1 Greenleaf, 231.

In a case found in the California reports the action was predicated upon the assignment of a contract entered into by one Estill and a board of commissioners created by statute, being the lieutenant governor, controller, and treasurer, and authorized to lease certain prison grounds and convict labor. The contract begins with a recital of the names of the members of the board, with their official designations, "party of the first part," and concludes:

"In witness whereof Robert M. Anderson, lieutenant governor of the State of California; George W. Whitman, controller of the State of California, and Henry Bates, treasurer

of the State of California, constituting the board of State prison commissioners, and the said James M. Estill, party of the second part, have hereunto set their hands and seals the day and year first above written.

"[SEAL.] R. M. ANDERSON,
"[SEAL.] GEO. W. WHITMAN,
"[SEAL.] HENRY BATES,
"*Board of State Prison Commissioners.*
"[SEAL.] J. M. ESTILL."

Field, C. J., announced the opinion of the court, and says, in reply to an objection that the contract was defectively executed from the fact that it was signed by the commissioners with their individual names and not with the name of the State (456):

"The contract purports, in its body, to be between the State, acting by the commissioners, under the act of the 21st of March, 1856, of the one part, and Estill on the other, and is signed by the commissioners with the affix 'board of State prison commissioners.' The instrument does not purport to be the act of the commissioners alone, but the act of the State by them. The State, by them, makes the lease and contract, and it is with the State that the lessee enters into the covenants and agreements contained in the indenture.

"The objection is applicable only to contracts of a private character, made in cases of a mere private agency. A different rule exists in reference to contracts executed by agents of the Government. In such cases, says Mr. Justice Story, in speaking of the liability of public agents, the presumption prevails that the parties contract, not personally, but merely officially, within the sphere of their appropriate duties."

State *vs.* McCauley, 15 Cal., 429.

In Hopkins *vs.* Mehaffy, 11 S. and R., 126, it appeared that defendant had signed and affixed his individual seal to a contract purporting to be made by and for the benefit of "the president, managers, and company of the Manchester Turnpike road." Suit was brought against Mehaffy as an individual. Held not liable. The court say:

"There is a striking and substantial difference between the covenants of an agent who describes himself as contracting for his principal and the covenant of a principal through the means and by the instrumentality of an agent. The first is the covenant of the agent and the second is the individual covenant of the principal; and in this respect the case at bar differs from Randall *vs.* Van Vechten, in which the distinction seems not to have been adverted to. No decision can be found in support of the position that what appears on the face of the deed to be the proper covenant of the principal, but entered into through the agency of an attorney (which, by the by, is the legitimate form of the instrument where the attorney is not to be bound) shall be taken to be the proper covenant of the attorney wherever he had not authority to execute the deed.

"This is precisely the case before us. In the body of the instrument the covenants are stated as if they were made by the corporation directly with the plaintiff without the agency of any one, the defendant not being named."

The East Warren Lumber Co. executed a mortgage to secure its promissory note. The by-laws of the company authorized the president and treasurer to execute transfers of real estate. The *testimonium* clause was:

"In witness whereof, we have hereunto set our hands and seals, etc."

DAVID C. FRENCH, [SEAL.]
President of the East Warren Lumber Co.
APHRAIM S. CALLEY, [SEAL.]
Treasurer of the East Warren Lumber Co.

Held the deed of the corporation.

The court say, *inter alia:*

"The construction of the deed is to be made upon the whole instrument, and not upon particular parts only. Effect is to be given to it, according to the intention, whenever it can by law be done. No part of the language is to be rejected, if it admits of a construction consistent with the general intent of the writing, but if the general intention of the instrument can be distinctly seen, and there is any part of its language which is irreconcilable with the rest, or if

there is any part which would render the deed invalid, if effect should be given to it according to its natural construction, and it is capable of any other construction consistent with the general intent, that construction is to be adopted. And if there is any part which, upon any construction of which it is capable, is inconsistent with the principal purpose of the instrument, and must necessarily defeat its operation, it is to be rejected as a mere mistake.

"In the present case, upon the attendant facts, it is impossible to doubt the purpose of these parties.

"The names of the agents of the company, which are subscribed do not appear in the body of the instrument, and they are in no way referred to in it. Nor is there any pretense, that upon the terms of the instrument or upon any construction any person can be regarded as the grantor but the Lumber company.

"It is argued that because there is a seal against the name of each of the signers, the president and treasurer of the company, they must be deemed not the seals of the company but the seals of the agents. This construction is forbidden by the general principles stated, and either seal might properly be rejected as inconsistent with the general intent of the instrument, if that was necessary to prevent the defeat of the deed, but it is not."

Tenney *vs.* Lumber Co., 43 N. H., 344.

Mortgage of the Flower Brook Manufacturing Co.—The *testimonium* clause was in these words:

"In witness whereof we have hereunto set our hand and seal this 15th day of December, A. D. 1842."

The deed was signed "William Wallace, agent for the Flower Brook Manufacturing Company," and seal. The corporation had no corporate seal.

Held, the deed of the corporation.

McDaniels *vs.* Flower Brook Manfg. Co., 22 Vt., 274.

"The signature of the duly authorized agent of the corporation executing the instrument in its behalf being proved, the seal, though mere paper and wafer without any specific stamp or mark, will be presumed to be the seal of the corporation."

Stebbins *vs.* Merritt, 10 Cush., 34.

"A corporation may execute a deed in these words: 'In testimony whereof said party of the first part have caused these presents to be signed by their president and their common seal to be hereto affixed. A. B., pres't,'" and seal.

Haven *vs.* Adams, 4 Allen, 80.

"The ancient doctrine of the common law was that a corporation could only act through the instrumentality of its common seal. But whatever may be the original correctness of this doctrine, as applied to corporations, existing by the common law, in respect even to which it has been certainly broken in upon in modern times, it has no application to corporations created by statute, whose charters contemplate the business of the corporation to be transacted exclusively by a special body or board of directors." * * *

"Every corporation created by statute may act as the statute prescribes, and the common law cannot control by implication that which the legislature has expressly sanctioned."

Fleckner *vs.* Bank of U. S., 8 Wheat., 357 (decided in 1823).

The current of authority in favor of the proposition that the contract sued on in this action is the *covenant* of the District of Columbia is overwhelming. Here and there in the State reports may be found occasional rulings in the opposite direction, but these are contrary to the vast current of authority. Besides, all of these seemingly adverse decisions, where they did not turn on other points, are at variance with the reasoning of Hodgson *vs.* Dexter, Sheets *vs.* Selden, and Jacksonville, &c., R'w'y Co. *vs.* Hooper, *supra*. A few only of these will be noticed.

In Regents, &c., *vs.* Detroit, &c., Society, 12 Mich., 156, the opinion was announced by Christiancy, J. He cites no authority in support of his conclusion. The case turned largely on other points, and there was a dissenting opinion.

In Blanchard *vs.* Town of Blackstone, 102 Mass., 307, it is stated in the opinion of the court: "It is unnecessary to

inquire whether either of the seals affixed could be deemed the seal of the town."

Caldwell *vs.* Morgantown Mfg. Co., 28 S. E. Rep., 475, turned on the failure of a grantor corporation in a deed to comply with the requirements of the code of North Carolina

Whitford *vs.* Laidler, 94 N. Y., 145, decides that lessees acting in behalf of and as officers of a corporation are not personally liable to pay the rent reserved.

Savings Bank *vs.* Davis, 8 Conn., 191, was decided by a divided court. Three of five judges did not sit, and the case can only be considered as the individual opinion of a single judge.

Mitchell *vs.* St. Andrews, &c., Land Co., 4 Fla., 200, if it can be considered an authority for anything, is in direct conflict with the conclusion of Jacksonville, &c., R'w'y Co. *vs.* Hooper, 160 U. S., 514, an appeal from the northern district of Florida.

In the case of Randall *vs.* Van Vechten, 19 Johns. R., 59, the agreement sued on purported to be made on the part of the town by "a committee appointed by the honorable the corporation of the city of Albany for that purpose." The members of this committee signed this agreement and affixed thereto their individual seals. They were sued as individuals, and it was held that they were not liable. What is said in the opinion about an action of covenant on the contract as against the town is purely *obiter*. The case turned on a proposition of the court that "the corporation seal is the only organ by which the body politic can covenant." This is opposed to the conclusion of the Supreme Court in Fleckner *vs.* Bank, *supra*. See also comments on this case in Hopkins *vs.* Mehaffy, 11 S. & R., 128.

In The Bank of Metropolis *vs.* Guttschlick, 14 Peters, 21, it appears that the bank, by an agreement signed by its president and cashier, undertook to sell a certain lot of ground to G., who paid the purchase price. But the bank could not make title, and G. sued for a return of the money

he had paid. The action was in assumpsit against the bank as for money had and received. The court decided the action well brought, and though it in terms approves of the ruling in Randall *vs.* Van Vechten, such approval was *obiter*.

The discussion of this branch of the case can well be concluded by reference to the case of—

Heidelberg School District *vs.* Horst, 62 Pa. St., 307.

In this case certain officials duly authorized to borrow money for the town gave their bond for its repayment, describing themselves as "school directors of Heidelberg township." The bond was signed by them in their individual capacity, with scroll seals opposite each name. The trial court instructed the jury:

"The school directors had the right to borrow the money for the purposes indicated by the resolution, and the bond given is not binding on the men who signed individually, but on the municipality only."

The opening sentence of Agnew, J., who announced the opinion of the supreme court confirming this ruling, is peculiarly appropriate here:

"This is an attempt to impale an honest debt on the sharp points of the law, which ought not to succeed, and we think the corrective power of the court is sufficient to prevent it."

II.

It was not only competent, but essential to the issues, for the plaintiff below to show when the contract was executed.

The contract provides that the contracting company should have "136 days after the date of the *execution* of the contract" for completing the delivery of the pipe (R., p. 15). True it may be that the contract was "made and concluded" on the 29th

day of June, for on that day the Camden Iron Works signed the contract which had been prepared in the office of the District Commissioners. In other words, the terms of the contract were on that day agreed upon by the parties to it; but it was not yet a contract, for the law required that it be first signed by all three of the Commissioners. A distinction is thus drawn between the date of the contract and the date of execution. As is well said by the trial court (R., p. 49):

"The provision is that 'all work must be commenced within — days and completed within 136 days after the *date of the execution of the contract.*' It appears to me that if it had been intended to indicate by that language the *date* of the contract, it would have been much easier and more simple to have said from the *date* of the contract than from the *date of the execution of* the contract."

The purpose of this peculiar provision is manifest. It will be remembered that the fines and penalties for delay in delivery imposed upon the contractors were very onerous, while the time for doing the work was very short. To take away from this while waiting for the Commissioners, all of them, to sign the contract, would have been requiring more of the contractors than even the Board of Commissioners, as then constituted, would exact. Hence provision was made for possible delays in the office of the Commissioners by drawing a distinction between the date of the contract and the date of the execution of the contract.

"But it is always competent to show that a deed was executed on a day subsequent to date on which the deed itself is stated to have been executed."

Hall *vs.* Cazenove, 4 East., 477.
Baldwin *vs.* Freydenhall, 10 Ill. App., 112.
Commonwealth *vs.* Welch, 144 Mass., 356.
Bruce *vs.* Slump, 82 Va., 352.

The date appearing on the face of a contract is not conclusive, even against the parties to it.

School District *vs.* Stilley, 36 Ills. App., 135.
Treadwell *vs.* Reynolds, 47 Cal., 171.

The time of the delivery of a deed may be proved by parol.

Maybury *vs.* Brien, 15 Peters, 21 (38).

The delivery of a deed is presumed to have been made on the day of its date. But this presumption is removed by evidence that it was made on some subsequent day; and when a delivery on some subsequent day is shown, the deed speaks on that subsequent day and not on the day of its date.

U. S. *vs.* Le Baron, 19 Howard, 73.

A deed takes effect only from the time of its delivery.

County, etc., *vs.* American Emigrant Co., 93 U. S., 126.

The discussion of the learned Chief Justice, who announced the judgment of the Court of Appeals, is conclusive of this branch of the case. He says (R., p. 63):

"The next question is that which relates to the admissibility of parol evidence to show that the contract was in fact executed and delivered by the Commissioners at a date subsequent to that stated in the contract. But this question we think is without reason or principle to support it. No principle is better established than that it may be averred in pleading and shown in proof that a deed, bond, or other instrument, was in fact made, executed and delivered at a date subsequent to that stated on its face. In the old case of Oshey *vs.* Sir Baptist Hicks, Cro. Jac., 263, in an action of covenant, where, by a charter-party under seal, *bearing date the 8th of September*, it was agreed that the defendant should pay for a moiety of the corn which *then* was, or afterwards should be, laden on board a certain vessel, the defendant pleaded that the deed was not delivered *until the 28th day of October*, and that on and after that date there was no corn

on board; and, on demurrer, it was held a good plea, because the word *then* was to be referred to the time of the actual delivery of the charter-party, and not to its date."

"And so in the case of Hall *vs.* Cazenove, 4 East, 477, it was held that a plaintiff could declare in covenant that the deed was *indented, made and concluded* on a day subsequent to the day on which the deed or charter-party on its face stated that it was indented, made and concluded. And in the more recent case of Steele *vs.* Mart, 4 B. & Cr., 272, in an action of debt on a lease, where the lease purported on its face to have been made on the 25th of March, 1783, *habendum* from the 25th of March now last past. It was proved that the delivery was made after the day of the date, and the court of king's bench held that the word *now* referred to the time of delivery, and not to the date of the lease. The same principle is clearly and fully stated by the Supreme Court, in the case of The United States *vs.* Le Baron, 19 How., 73."

"These cases are sufficient to show that there is nothing in the mere date as stated in the deed or contract to estop or preclude either of the parties from showing by parol evidence that the deed or contract was actually made and executed at a date subsequent to that stated in the deed or contract, and that, consequently, such deed or contract can only have effect and operation from the time of its actual execution."

III.

The District Commissioners by their conduct released the Camden Iron Works from strict performance of the covenant in respect of the time of deliveries.

a. The contract sued on in this action was signed by the Camden Iron Works on the 29th of June, 1887, and forwarded by mail on the same day. For some reason it was not returned to that company until the 4th day of August, then next, thus necessarily entailing a delay of 33 working days in the commencement of the work of casting the pipe specified in the contract.

b. At the Ludlow interview, about September 12, the Camden Iron Works requested the immediate return of the inspector. He did not do this till October 17 (R., p. 35), thus entailing a further delay of 33 days in the commencement of the work through no fault of the contractors.

c. Plaintiff in error offered no evidence to show when the contract was executed according to the requirements of the statute. It had not been so executed on the 4th of August, for it then lacked the signature of Mr. William B. Webb, one of the Commissioners. "It appears by the evidence that Mr. Webb was sick at the time and possibly away from the District of Columbia" (R., p. 50).

There is no date, therefore, shown by the evidence from which the 136-day period should begin to run. Until this is shown, the contractors cannot be charged with fines and penalties.

(The contract was signed at some date subsequent to August 4 by all of the Commissioners, and was duly copied in the book kept for that purpose in the office of the Commissioners, as required by the act approved June 11, 1878. See the testimony of Tindall, secretary of the Board of Commissioners—R., pp. 8 and 9.)

If a party to a contract who is entitled to the benefit of a condition, upon the performance of which his responsibility is to arise, dispense with, or by any act of his own prevent the performance, the opposite party is excused from proving a strict compliance with the condition.

Thus, if the precedent act is to be performed at a certain time or place and a strict performance of it is prevented by the absence of the party who has a right to claim it, the law will not permit him to set up the non-performance of the

condition as a bar to the responsibility which his part of the contract had imposed upon him.

Williams *vs.* Bank, 2 Peters, 102.

If a contracting party absolutely binds himself to perform things which subsequently become impossible of performance, or to pay damages for the non-performance thereof, and the thing which causes the impossibility might have been foreseen and guarded against in the contract, or arose from the act or default of the promisor, he will be held to a strict performance of the contract; but if the cause of the impossibility be of such character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, he will not be held by general words, which though large enough to include it, were not used with reference to the possibility of the particular contingency which afterwards happened.

Chicago, M., &c., R. R. Co. *vs.* Hoyt, 149 U. S., 14 & 15.

Delay of a city in preparing piers upon which a bridge is to be erected by a contractor, thereby hindering his work, will prevent any deduction for consequent delay in its completion, although his contract provides for deductions from the contract price in case of failure to complete the work within a certain time (Thayer, J., U. S. ct., E. dist. Mo.).

In this case the contractor was to begin work within one week after notice and complete within ten months. Notice for him to commence work was given December 12, 1887, but piers not completed until November 12, 1888. Contractor completed his work June 17, 1889, less than ten months and one week after the piers were in condition for him to begin work.

The difference between the time the work should have been completed after the notice of December 12, 1887, and when it was finished is seven months and twenty-eight days.

The street commissioner assessed damages for six months and thirteen days under the *per diem* deduction clause.

Where, by defendant's neglect, the plaintiff was prevented from completing the work in the time specified in the contract, the result is that the provision awarding damages in a given sum for delay in completing work is as effectually eliminated from the contract as if the parties had canceled it by express agreement. It is wholly immaterial whether we say the provision was waived or the defendant is estopped. In either event the result is the same (43 Fed. R., 762).

In Van Buren *vs.* Digges, 11 How., 479, it appeared that plaintiff had contracted to build and complete a house on or before the 25th of December, 1844, but delay was caused by extra work done by the defendant. Upon this point the court say:

"It is difficult to conceive upon what ground the defendant could be permitted to interpose an obstruction to the fulfillment of the contract, and then to convert that very obstruction into a merit on his part, or into the foundation of a claim against the party whom he had already subjected to the inevitable consequences of the obstruction so interposed; an inability to comply with his engagement and a postponement of the fruits of a compliance therewith, if that had been permitted."

In U. S. *vs.* Peck, 102 U. S., 65: It is a sound principle that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned.

See also Coal Co. *vs.* O'Hern, 8 Md., 201.

Coke Litt., p. 207, thus states the rule:

"If A. be bound in a bond that J. S. shall marry J. C. before such a day, and before the day B., the obligee, marry her himself, he shall never take advantage of the bond, for *that he himself* is the means that the condition could not be performed, and this is regularly true in all cases."

If he who is to be benefited by another's fulfilling *his* contract or agreement is the occasion why it is not carried into execution, the contract is thereby dissolved and the party bound discharged from his obligation.

Powell on Contracts, 417.

Cited in Marshall *vs.* Craig, 1 Bibb, Ky., 390.

"Hinderance by one party to a contract whereby the other party is prevented from completing his part of the contract within the time specified affords a legal excuse for non-performance within said period.

"An objection to the offering of any excuse by the plaintiff for not performing his part of the contract within the time stipulated is properly overruled."

Stewart *vs.* Keteltas, 37 N. Y., 388.

See also Hinckley *vs.* Pittsburg, &c., Co., 121 U. S., 264.

"He who prevents the performance of a thing of which he is to have the benefit cannot insist on any advantage from its non-performance. In such a case the act is considered as done, as far as respects the rights to arise upon its performance to him who was to perform it."

Ashcraft *vs.* Allen, 4 Iredell, L., 99.

The plaintiffs, on the 19th of April, 1836, entered into a written contract to build, for the sum of £1,700, a brewery for the defendants, so far as regarded the carpenter's work, within the space of four and a half months next ensuing the date of the agreement, and in default of completing the same within the time limited to forfeit to the defendants £40 per week for each week that the completion of the work should be delayed beyond the 31st of August, the amount to be deducted from the said sum of £1,700 as liquidated damages. The plaintiffs did not begin work for four weeks after the date of the agreement, in consequence of the defendants not being able to give them possession. They were then delayed one week by default of their workmen and four weeks by default of masons, etc., employed by the defendants, and the work

guage or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood and the law abhors both. This remedy is always so applied as to promote the ends of justice. It is available only for protection and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit. It is akin to the principle involved in the limitation of actions and does its work of justice and repose where the statute cannot be invoked."

Dickerson *vs.* Colgrove, 100 U. S., 580.

"Estoppel *in pais* operates in favor of a person who has been misled to his injury."

Ketchum *vs.* Duncan, 96 U. S., 659.

"Where a person tacitly encourages an act to be done he cannot afterwards exercise his legal right in opposition to such consent if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adverse claim."

Swain *vs.* Seamens, 9 Wallace, 254.

"The law is well settled that a municipal corporation may waive conditions and estop itself."

Randolph County *vs.* Post, 93 U. S., 502.

"A county or other municipal corporation, being authorized by statute to borrow money and issue bonds for the payment thereof, if the bonds be made and delivered reciting the facts, which show them to have been regularly issued, the county is estopped to deny their regularity or to assert that they were not made in conformity to the statute."

Moran *vs.* Commissioners, etc., 2 Black, 722.

See also, Pendleton *vs.* Amy, 13 Wallace, 298.

"A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot, by their representations or silence, in-

volve others in onerous engagements and then defeat the calculations and claims their own conduct has superinduced."

Zabriski *vs.* Cleveland, etc., R. R. Co., 23 Howard, 381 (402).

If the District did not intend that the terms of cancellation *quoad* pipe not cast, as set forth in the contractor's letter of date November 30, 1887, were acceptable it should have said so at the time. Having then remained silent when it ought to have spoken, it cannot now speak when it ought to remain silent. This for the reason that the Camden Iron Works parted with about $11,400 worth of pipe, which it never would have done unless misled by the silence of the District Commissioners.

V.

The plaintiff below was entitled to recover on the sealed contract for pipe actually delivered at contract rates, though all the pipe specified was not delivered.

On the subject of payments for material delivered the contract contains the following provision (R., p. 13):

"Payments will be made after August 1st and September 15th for all pipes, valves, and castings received and accepted in proper order and condition and in accordance with these specifications, less twenty (20) per cent. of the amount found due, to be reserved until the satisfactory completion of the contract."

Under this a cause of action would have arisen on the special contract upon the acceptance by the District of any consignment of pipe for the value thereof at contract prices, less the 20 per cent. retain, had the Camden Iron Works demanded payment therefor and payment had been refused.

It can make no difference, so far as concerns the right of action thus given by the contract, that the company did not demand payment until the so-called settlement was made in the auditor's office, and then only for the money wrongfully retained out of the contract price. This being refused, a right of action at once accrued on the covenants for all pipe delivered and not paid for at contract rates.

The clause about making payments, found under the head "General conditions, 1887–'88" (R., p. 15), requiring an estimate to be made by the Engineer Commissioner, was manifestly not intended to form a part of a contract for the purchase and delivery of material made according to certain definite specifications. It might apply to the work of laying the pipe after delivery, but it has no controlling or enlightening effect on this contract.

Even had the contract been an entirety, which clearly it is not, this action would still be maintainable.

The rule in such cases is that where the party suing has not departed from the terms of the special contract at all, but has been ready and willing to do all that it was the intention of the parties he should do, his action is properly said to be brought upon the special contract itself.

Cutter *vs.* Powell, Smith's Leading Cases, 8th ed., vol. II, part 1, p. 33.

"In an action for breach of contract by wrongfully putting an end to it, the party committing the wrong is estopped from denying that the other party has been damaged to the extent of his actual loss and outlay fairly incurred."

U. S. *vs.* Behan, 110 U. S., 338.

The point is conclusively decided in Phillips, etc., Construction Co. *vs.* Seymour *et al.*, 91 U. S., 642.

Mr. Justice Miller, in announcing the opinion of the court, well says:

"If the builder has done a large and valuable part of the work, but yet has failed to complete the whole or any spe-

cific part of the building or structure within the time limited by his covenant, the other party, when that time arrives, has the opportunity of abandoning the contract for such failure, or of permitting the party in default to go on. If he abandons the contract, and notifies the other party, the failing contractor cannot recover on the covenant, because he cannot make or prove the necessary allegation of performance on his own part. What remedy he may have in assumpsit for work and labor done, materials furnished, &c., we need not inquire here; but if the other party says to him, 'I prefer you should finish your work,' or should impliedly say so by standing by and permitting it to be done, then he so far waives absolute performance as to consent to be liable on his covenant for the contract price of the work when completed."

Counsel for the District rested their contention mainly on a supposed modification of the contract and an enlargement of the time of performance. But it is not shown that the parties "came to a subsequent agreement by parol to do a different thing than that which the covenant required" (1 East., 631). The Camden iron works had been prevented from commencing the work by the failure of the District Commissioners for more than 33 days to execute the contract. The work was further delayed for more than 30 days by the failure of the District to send forward an inspector after the Ludlow interview, about the 15th day of September, and necessarily delays were incident to the incompetency of the man Hoyt to act as inspector in rejecting more than one-seventh of the pipe actually cast, though the pipe so rejected complied substantially with every requirement of the specifications. The plaintiff below, therefore, averred in its declaration that it was "*prevented*" by the defendant from performing the contract. But there was no express or other agreement for an enlargement of the time of performance. That was brought about by the acts of the District, just noticed, and the District now seeks to take advantage of its own wrong as causing such a modification of the covenan as to prevent recovery on it.

Again, before the contract was fully performed the District requested that it be relieved from receiving all the pipe agreed to be delivered, and the Camden iron works assented to the request. Wherefore the declaration avers that the plaintiff was "*discharged*" from the full performance of its covenant.

But neither prevention of the performance of a covenant nor discharge from full performance is such a modification as will prevent an action on the covenant. For when a large and valuable portion has been done by one party and nothing remains but the payment of the price, the other party "so far waives absolute performance as to consent to be liable *on his covenant* for the contract price of the work when completed" (per Miller, J., in Phillips *vs.* Seymour, 91 U. S., 650).

So the plaintiff in error here is liable on its covenant for the contract price of the pipe actually delivered and accepted.

VI.

No penalties should be allowed, except to the extent of actual damage shown.

The contract provides for two kinds of penalties for delay, one of which is styled liquidated damages. They are as follows:

"In case the deliveries are not made as above specified there will be deducted from the contract prices herein specified one per cent. of the contract price for all delinquent articles for each and every week day that they remain delinquent."

The other forfeiture is $10 per day "estimated as liquidated and fixed damages to the District, arising from failure to complete the work at the time specified."

Both of these may equally be considered as penalties and forfeitures for delay.

It is a general proposition that the law abhors a forfeiture.

The fact that the parties fix a sum to be paid and call it liquidated damages does not always control the question as to the measure of the recovery for the breach of the contract. Courts will look to the nature and purpose of fixing the amount of damages to be paid, and if the clause fixing the amount of damages appears to have been inserted to secure the prompt performance of the agreement, it will be treated as a penalty, and no more than the actual damages proved can be recovered.

Scofield *vs.* Tompkins, 95 Ills., 193.
Bradstreet *vs.* Baker, 14 R. I., 549.

In Hahn *vs.* Horstman, 12 Bush. (Ky.), 254, Hahn sold a lot of ground for $1,800, agreeing in the deed to do certain work on the lot within a certain time or pay as liquidated damages $20 per day for each day's delay in completion, "to be deducted from the purchase price." There was a delay in completion of 368 days, for which the damages amounted to $7,360. The court say:

"To enforce this obligation by a judgment for the stipulated damages would be not only to deny the appellant the right to recover any part of the purchase-money, but to render judgment against him for several thousand dollars" (255).

"The bare statement of the proposition is a sufficient reason for treating the sum to be paid in the event of a breach as a penalty" (255).

"By the letter of the contract if the appellant had completed all the work but filling the alley, and this had remained unfinished for as long a period as ninety days after the breach, he would have forfeited the whole of the purchase-money.

"To hold the sum liquidated damages 'would not only amount to a judicial confiscation of Hahn's property, but

make the appellants pensioners upon his estate *ad infinitum.*'"

See also Greer *vs.* Tweed, 13 Abbott's Pr. N. S., 430.

In contract 815 $10 per day is stated as liquidated damages. There cannot be two amounts in same contract settled as such damages. So per cent. deduction must be penalty.

See Colwell *vs.* Foulks, 36 How. Pr., 306.

In Welch *et al. vs.* McDonald, 85 Va., 500, Welch agreed to furnish stone in accordance with plans and specifications to be furnished by McDonald by a certain date or pay $5 per day for each day's delay. Plans were not furnished. *Held*, McDonald could recover nothing for damages. The court say:

"The whole case bears the marks of a purpose on the part of the plaintiffs to drive the defendants into a failure, and then to extort from them a most unconscionable claim for consequential damages in addition to the damages fixed in the contract."

Unless the intent of the parties is very clearly expressed the forfeiture named for non-fulfillment of a contract, where excessive, will not be construed as intended to be liquidated damages.

Colwell *vs.* Lawrence, 38 N. Y., 71.

No damage was sustained by failure to deliver pipe as per contract, because Captain Symons says that they could not have been laid, giving as a reason that the appropriation for the water department would not permit it.

He therefore asked for a cancellation of the contract, concluding his request with the following significant words:

"The question of available funds is the only and sole question involved" (R., p. 33).

On the subject of penalties and liquidated damages the plaintiff in error was given "the benefit of all the law to which it was entitled" by the court below. The jury were instructed that there could be no deduction by reason of the one per cent. a day provision, because it was a penalty pure and simple, and no actual damage had been shown. The proposition is further stated thus:

"It is not stipulated for as liquidated damages, and it is out of all proportion to the damages the District might sustain by reason of non-delivery on time" (R., p. 49).

On the question of the $10 per day provision stipulated for as "liquidated damages," the court below was equally explicit. The jury were instructed that when they found a date at which the 136-day period should begin they should deduct from the plaintiff's claim $10 per day on pipe delivered after the contract time and the pay of the inspector during the same period (R., p. 56). This was a question of fact for the jury, and it was found against the claim of the defendant below.

VII.

The Camden Iron Works was not guilty of laches. It objected to the account as stated and made every reasonable effort to secure a settlement out of court.

The treasurer of the contracting company made several trips to Washington for the purpose of having the account fairly and amicably settled. So did the president. The latter also made two special trips to Detroit to see Colonel Ludlow, then no longer a District Commissioner.

Finally, in November, 1892, a letter was written to the Commissioners, going fully over the case and demanding a settlement. The company was advised by the District secre-

tary to apply to Congress for relief. This it did within two months thereafter.

Mr. Wood had no knowledge of the course of procedure in Congress, but had a bill introduced which he thought would be referred to the Commissioners, recommended by them, and promptly passed.

After waiting a year for this he employed counsel to take the case to court as the only means of securing payment. Shortly thereafter suit was begun and in the lifetime of the contract.

The Camden Iron Works tried in season and out of season to secure an amicable settlement, protesting all the while against the injustice done the company.

Why should it be charged with laches because it hesitated to go into court or incur a large expense for counsel fees?

VIII.

The question of interest was one for the jury to determine.

Section 829, Revised Statutes of the District of Columbia, provides that the rate of interest shall be 6 per cent., "and the amount which is to bear interest and the time from which it is to be paid shall be ascertained by the verdict of the jury sworn in the case."

If the jury found that the plaintiff should have interest, it must have been calculated at the rate of 6 per cent.

Demand of payment of the balance due for pipe furnished at contract rates was made by the plaintiff corporation immediately upon the receipt of the so-called statement of account showing that fines equal to the value of the pipe so delivered were charged against the company, and demand was constantly being made from time to time during the next five or six years and was met by constant refusal.

The matter of the right to recover interest is well stated by the court in Crawford *vs.* Willing, 4 Dall., 286. The syllabus reads:

"Interest is due on an ascertained balance of an account from the time of a demand of payment."

The court, in its opinion, says:

"Whatever may have been the doctrine in former times, we have traced, with pleasure, the progress of improvement upon the subject of interest to the honest and rational rule that whenever one man retains the money of another against his declared will, the legal compensation for the use of the money shall be charged and allowed. * * * For my own part I am prepared to say, with the book cited, that interest ought to follow a debt as the shadow does its substance. Even in the case of goods sold and delivered, we think it right to allow interest as soon as the express or the implied term of credit had elapsed and a demand of payment was made."

If the contract has been merged in a judgment the matter of interest depends upon legislative enactment.

Morley *vs.* Lake Shore R. R. Co., 146 U. S., 168.
U. S. Mortgage Co. *vs.* Sperry, 138 U. S., 352.

It is said that interest is recoverable of right when it is reserved in the contract, but when it is given as damages it is within the discretion of the court to allow or disallow it, and it will not be allowed if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim.

Redfield *vs.* Ystalifera Iron Co., 110 U. S., 174.

In this case the plaintiff delayed entering up judgment for twenty-nine years after verdict, and the court allowed interest only from the time the judgment was entered.

Can the District of Columbia show laches on the part of the plaintiff as for delay in the institution of the suit when

it is brought within the statutory limit of time? Clearly not.

The matter of interest on the demand, under District laws, rests entirely with the jury. If they find interest, it must be at 6 per cent. Judgment must then be entered for a lump sum, principal and interest.

Thus the law stood and became a part of the contract between the parties at the time of the passage of the act of September 30, 1890, which provides that the rate of interest on judgments against the District of Columbia, when authorized by law (that is, in all actions *ex contractu*), shall be at a rate not exceeding 4 per cent.

The judgment was therefore properly entered on the verdict (R., p. 7). On this judgment interest runs at the rate of 4 per cent. only.

The three prayers of the plaintiff below were properly granted. None of them are based upon any modification of the contract, real or supposed.

The first told the jury that the plaintiff shall have the value of pipe actually delivered at contract rates, less deductions for payments made and liquidated damages under the $10 per day provision. The District having failed to show any loss by reason of delay in delivery, there could be no abatement as for the one per cent. per day provision, which was clearly a penalty as distinguished from liquidated damages.

The second instruction told the jury that if the delays were caused by any act or omission on the part of the District fines and penalties could not be charged therefor against the plaintiff.

The third instruction is an application of the doctrine of estoppel, and is so clearly right as to need no discussion. Not to have applied this doctrine to the case would have permitted the Commissioners to take advantage of their own wrong.

The defense to this action is well characterized by the apt

words of Agnew, J. (62 Pa. St., 307): "This is an attempt to impale an honest debt on the sharp points of the law, which ought not to succeed." There is no reason shown in law or conscience why the District of Columbia should not pay the Camden Iron Works at contract rates for pipe delivered and accepted and used in the extension of the water service of the municipality. It is estopped from claiming fines and penalties as for delay in delivering pipe after the first of December, 1887, because it had agreed before such pipe was shipped to accept and pay for it "at the regular contract price without any deduction" (R., pp. 32 and 34). But for this agreement the pipe would not have been shipped (R., p. 36).

"The estoppel here relied on is known as an equitable estoppel *in pais*. The law upon the subject is well settled. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. The remedy is always applied so as to promote the ends of justice."

Dickerson *vs.* Colgrove, 100 U. S., 580.

The case was carefully tried below, and it is respectfully submitted that the judgment appealed from should be affirmed.

SAM'L MADDOX,
Attorney for Defendant in Error.

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JAMES H. MCKENNEY,

No. 172.
Sup. Ct. Dist. of Columbia Law Docket

Filed Mar. 6, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 172.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

CAMDEN IRON WORKS.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

SAMUEL MADDOX,
Attorney for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-6-'01.

Supreme Court of the United States

OCTOBER TERM, 1900.

No. 172.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

CAMDEN IRON WORKS.

Supplemental Brief on Behalf of the Defendant in Error, Being a Reply to the Brief of Counsel for the Plaintiff in Error.

The first proposition presented by the counsel for the plaintiff in error is that the Commissioners of the District of Columbia have no power to bind the municipality by a contract under seal; but this claim proceeds upon a misconception of the large powers granted the Commissioners by the later enactments of Congress upon the subject, beginning with the act of February 21, 1871, entitled "An act to provide a government for the District of Columbia" (16 Statutes, 419). By section 1 of this act it is provided that all that part of the territory of the United States included within the limits of the District of Columbia be created into a government, by the name of the District of Columbia, by which name

it was constituted "a body corporate for municipal purposes," with the power to make contracts, sue and be sued, and "to exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States." A governor and legislature were created; also a Board of Public Works. To this board was given the control and repair of the streets, avenues, alleys, and sewers of the city of Washington, and all other works which might be entrusted to their charge by the Legislative Assembly or Congress. They were empowered to disburse the moneys raised for the improvement of streets, avenues, alleys, and sewers, and roads and bridges, and to assess upon adjoining property, especially benefited thereby, a reasonable proportion of the cost, not exceeding one-third. The acts of this board were held to be binding on the municipality of the District in Barnes *vs.* the District of Columbia, 91 U. S., 540.

This constitution lasted until June 20, 1874, when an act was passed entled "An act for the government of the District of Columbia, and for other purposes" (18 Statutes, 116). By this act the government established by the act of 1871 was abolished, and the President, by and with the advice and consent of the Senate, was authorized to appoint a commission, consisting of three persons, to exercise the power and authority then vested in the governor and the Board of Public Works, except as afterwards limited by the act. By a subsequent act, approved June 11, 1878 (20 Statutes, 102) it was enacted that the District of Columbia should "remain and continue a municipal corporation," as provided in section 2 of the Revised Statutes relating to said District, and the appointment of Commissioners was provided for, to have and to exercise similar powers given to the Commissioners appointed under the act of 1874.

See Metropolitan R'd *vs.* Dist. of Columbia, 132 U. S., 6.

Upon the exercise of the powers thus granted there were two important restrictions.

By section 37 of the act of February 21, 1871, it was enacted "That all contracts made by the said Board of Public Works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the secretary of the District, and said Board of Public Works shall have no power to make contracts to bind said District to the payment of any sums of money except in pursuance of appropriations made by law, and not until such appropriations shall have been made."

("This section is deemed to be applicable to the present Commissioners." District of Columbia *vs.* Bailey, 171 U. S., 175.)

Again, by section 3 of the act of June 30, 1878, it was enacted "That all contracts for the construction, improvement, alteration or repairs of the streets, avenues, highways, alleys, gutters, sewers and all work of like nature shall be made and entered into only by and with the official unanimous consent of the Commissioners of the District, and all contracts shall be copied in a book kept for that purpose and signed by the said Commissioners, and no contract involving an expenditure of more than one hundred dollars shall be valid until recorded and signed as aforesaid."

None of these elements to a valid contract binding on the municipality is lacking in the case now under consideration, for by an act of Congress approved March 3, 1887 (24 Statutes, 580), the sum of one hundred thousand dollars was appropriated for "repairing and laying new mains," and for "lowering mains," and for the employment of engineers and others under the water department of the District government.

That the contract was signed by all of the Commissioners and recorded in the book kept for that purpose was established by the testimony of William Tindall, secretary of the Board of Commissioners at the time of the trial, who "pro-

duced the original contract mentioned in the declaration in this cause, and testified that the signatures of William B. Webb, Samuel E. Wheatley, and William Ludlow to said contract number 815 were their genuine signatures, and that they were at the time of signing said contract Commissioners of the District of Columbia; that this contract had been duly copied in a book kept for that purpose in the office of the Commissioners, as required by the act of Congress approved June 11, 1878" (R., pp. 8, 9).

So there was ample provision of law at the time contract No. 815 was signed to authorize the Commissioners to purchase $20,000 worth of iron pipe for the extension of the water service.

But counsel for plaintiff in error contend that even if the Commissioners had power to enter into a contract for the purchase of pipe for "repairing and laying new mains," they were yet without authority to make such an instrument under seal, because that was not "*necessary* to the faithful administration of the valid laws enacted for the government of said District." If such a test is applied to all contracts with the Commissioners, then it becomes an extremely hazardous matter for any person, natural or artificial, to have contract relations with the District of Columbia.

The plaintiff in error could just as well contend that the record does not disclose any necessity for the purchase of water-main pipe from the Camden Iron Works, or that there was any *need* for twelve-inch pipe, rather than pipe of a less diameter, and consequently not so expensive.

As said by the learned Chief Justice who announced the opinion of the Court of Appeals (R., p. 62): "The municipal corporation has the right to adopt a seal, and from time to time to change it. It has the right, therefore, to execute contracts under seal." And it may well be that the Board of Commissioners, as constituted in the year 1887, and their predecessors in office, deemed it a matter of prudence to require that contracts calling for large expenditures of money should

be under seal, indicating a deliberate and solemn act, and implying that caution and fullness of assent had been observed and secured. Wherefore they established for such contracts a printed form of attestation, which, as it is fair to assume, from the fact that it is in print, is used in contracts for building sewers and such other public improvements as may run through several years. Such contracts in no way increase the liability of the municipal corporation. In the present case, the existence of a seal adds nothing to the cost of the iron pipe, nor does it take anything from the rigid requirements of the specifications in respect of its quality, or yet lessen the severe penalties prescribed for possible delays in delivery. It does, however, put it out of the power of the present Board of District Commissioners to effectually plead the statute of limitations in bar of an action for the recovery of a debt honestly due and owing by the municipality, incurred for the benefit of its citizens, and for material from which the District is regularly receiving a handsome revenue.

The case of District of Columbia *vs.* Bailey, 171 U. S., 161, decided that the Commissioners have no power to submit to arbitration "a claim for unliquidated damages arising, not for work and labor performed and materials furnished, but from a refusal to permit the performance of work and labor and the furnishing of materials." The court ruled that "no authority is conferred upon the Commissioners to contract to pay a claim of the character embraced in the arbitration, and no appropriation has been made by Congress for the payment of any such claim."

But it is further contended that, even if the Commissioners have the power to execute a contract under seal, the contract in question is not so attested as to make it the sealed obligation of the District.

Several cases are cited which are supposed to controvert the decision of this court "that when a deed is executed or

a contract made in behalf of a State by a public officer duly authorized, and this fact appears upon the face of the instrument, it is the deed or contract of the State, notwithstanding that the officer may be described as one of the parties and may have affixed his individual name and seal" (2 Wallace, 187). But an examination of these cases discloses that they were decided on peculiar facts and circumstances, or that Randall *vs.* Van Vechten, 19 Johns. Rep., 60, was relied on as the sole authority. It is somewhat curious to note how the *dictum* of the court in this case has been followed in several of the States, and even referred to with approval by this court in Bank of Metropolis *vs.* Guttschlick, 14 Peters, 21.

In Randall *vs.* Van Vechten, which was decided in 1821 and was an action of covenant, certain individual defendants were sued upon an agreement entered into by them as "a committee appointed by the honorable the corporation of the city of Albany," signed by them as individuals and having their individual seals attached. The court held, very properly, that the individuals were not personally liable unless they had acted without authority in making the contract. So far the decision of the court is in line with the ruling of Chief Justice Marshall in Hodgson *vs.* Dexter, 1 Cranch, 345, decided in 1803. But after deciding this, the only question at issue in the Van Vechten case, the court went on to advise the plaintiff how he might recover his demand by an action of *assumpsit* against the town, and added that the contract entered into by its committee was good as a simple contract, but was not binding on the corporation as a special contract, because a corporate seal is the only organ by which a body politic can covenant—a point not presented, and one not necessary to be decided in pronouncing judgment in the case.

But this ancient doctrine of the common law "has no application to corporations created by statute whose characters

contemplate the business of the corporation to be transacted exclusively by a special body or board of directors."

Fleckner *vs.* Bank, &c., 8 Wheaton, 357.

The court of appeals of New York, in 1883, referred to the case of Randall *vs.* Van Vechten as deciding that where it appears on the face of the instrument that the parties to be bound contracted with reference to corporate business, and that they had authority to make the contract, it is immaterial to inquire whether or not the contract is sealed, for the signers do not become individually liable. (See 94 N. Y., 150.) To that extent, and to that extent only, can the case be relied on as an authority.

The cases relied on by counsel for the plaintiff in error are all very unlike the case under consideration. Taking these up in the order in which they are found on the brief, and it appears that:

The case in Clark *vs.* Read, 12 D. C. App., 343, was an action in *assumpsit* against certain individuals and a corporation upon a promissory note endorsed by the defendant corporation, to which its corporate seal was attached. Objection was made to the admission of the note in evidence on the ground that it was a sealed instrument. The objection was overruled on the ground that the mere impression of the corporate seal does not of itself convert the simple contract into a specialty. The court say (p. 351): "The impression of a seal will not be given the effect of destroying a negotiable instrument when plainly such was not the intention of the parties."

In Levering *vs.* The Mayor, 7 Humph., 552, it was held that a parol defeasance cannot be pleaded at law to defeat an agreement under seal.

The case in 12th Mich. is commented on in brief, p. 16. It went off on a demurrer to the declaration.

In Blanchard *vs.* Blackstone, 102 Mass., 343, the court held that it was unnecessary in the decision of the case to

inquire whether or not the seals of the individual selectmen who signed the contract sued on were the seals of the town.

In Burrill *vs.* Boston, 2 Cliff. (C. C.), 590, suit was brought on a contract made by the mayor, which the court held he had no authority to make. There was in the case no question about seals.

The case of Caldwell *vs.* Manufacturing Co., 121 N. C., 339, went off on the failure of the corporation officers to execute a deed conveying real estate as required by the State Code.

In Danville Seminary *vs.* Mott, 136 Ill., 289, there was some question with regard to the absence of the corporation seal from a deed conveying its real estate; but the case turned on a ruling of the court that the board of trustees were without power to execute the deeds, and that the deeds did not divest the corporation of its title.

In Female Orphan Asylum *vs.* Johnson, 43 Me., 180, the asylum, by their managers, were authorized to bind to service children under their control. It was held that a contract signed Mary B. Storer, in behalf of the asylum, *was not authorized* by the act. (This case should be contrasted with the decision of the same court in Stinchfield *vs.* Little, 1 Greenleaf, 231.)

In Whitford *vs.* Laidler, 94 N. Y., 145, an action was brought against certain individuals on a written contract signed by them as officers of the "Garrettsville Agricultural and Farmers' Club" for the use of certain premises as a fair ground. *Held*, that defendants were not liable in their individual capacities, but that the corporation was liable in *assumpsit* as for use and occupation of the demised land.

In South Missouri Land Co. *vs.* Jeffries, 40 Mo. App., 360, a motion was made to dismiss the suit because the bond was not signed by any proper officer of the corporation. The signature was as follows: "So. Mo. Land Co. W. E. Drew, superintendent, A. G. Hollenbeck." The motion was sus-

tained in the lower court, but the ruling was reversed on appeal.

In Bank of Metropolis *vs.* Guttschlick, 14 Peters, 21, it appeared that G. had entered into an agreement with the bank for the purchase of a lot of ground in Washington. The agreement was signed on the part of the bank as follows:

"JOHN P. VAN NESS, [SEAL.]
"*President of the Bank of Metropolis.*
"ALEXANDER KERR, *Cashier.* [SEAL.]"

By this agreement the bank undertook to convey a fee-simple title to G., who paid the stipulated price. Subsequently G. was ousted of his possession by the holder of a paramount title, and thereupon brought suit in *assumpsit* against the bank as for money had and received. No point seems to have been made in the brief of counsel for plaintiff in error that the suit should have been in covenant on the agreement, in which nothing is said about returning the purchase price in case the title proved defective. The agreement was simply one link in the chain of evidence tending to show failure of consideration for the money paid by G. It was in no sense the *foundation* of the suit.

What the learned justice who announced the opinion of the court says touching the matter of seals was not necessary in the decision of the case and cannot be considered as an authority for the contention of plaintiff in error in the present case. Besides, it is at variance with the later decisions of this court.

See Sheets *vs.* Selden's Lessee, 2 Wall., 187.
Jacksonville, &c., R'w'y Co. *vs.* Hooper, 160 U. S., 514.

In State *vs.* Allis, 18 Ark., 269, there was a special act of the legislature authorizing a board of inspectors, consisting of the secretary of state, auditor, and treasurer, to enter into a contract for the care and management of the State

penitentiary. In pursuance of the authority thus conferred, a contract was made and signed as follows:

"D. B. GREER, *Sec'y State.* [SEAL.]
"C. C DANLEY, *Auditor.* [SEAL.]
"J. H. CREASE, *Treasurer.* [SEAL.]"

The court held the State not liable in an action of covenant on this contract, and for the reason that the context of the act explained "what extent of the power, with respect to the grade of the contract, the legislature intended to confer on the inspectors," and that this was a simple contract. Also that if the legislature had intended to confer power to make a sealed contract, they would "have so expressed the purpose in the act, and at the same time provided for the affixing of the seal of the State thereto by the governor or some one else."

The constitution of the State ordains that there should be a seal of the State, "which shall be kept by the governor and used by him officially." * * * The State "can perform no corporate or sovereign act except through her chief executive without it is verified by this seal; and we doubt, exceedingly, whether the legislature possesses the power by act to prescribe any other mode for the authentication of the sovereign or corporate acts of the State, except by means of the seal ordained by the constitution, and required to be kept, and, consequently, affixed by the governor."

The Bank of Columbia *vs.* Patterson's Adm'r, 7 Cranch, 299, decided that *indebitatus assumpsit* will lie against a corporation on a contract under seal after the work is completed and for extra work not called for by the contract.

In all of these cases it appeared that the several corporations, whether State, municipal, or other, had adopted some device for use as and for its corporate seal. But in the case at bar it appears that although the Board of Commissioners to be appointed under the tentative act of June 20, 1874, and

those to be appointed under the act of June 11, 1878, providing a permanent form of government for the District of Columbia, were given power to adopt a seal, no formal action was taken by either board looking to the adoption of any device as a seal until September 23, 1887, three months after the contract sued on was signed by the Camden Iron Works; and even after its adoption, as stated by the secretary, Mr. Tindall (R., p. 18), it "was not generally used" and only in some cases was it affixed to tax deeds executed by the Commissioners.

So the inference is inevitable that prior to September 23, 1887, the printed *testimonium* clause, as found at the end of the contract in question, was always used in sealed obligations of the District, at least in the absence of proof that some other device had been adopted and used; and no such proof was adduced at the trial. In such case, as was decided in the well-considered case of Reynolds' Heirs *vs.* Trustees, &c., 6 Dana (Ky.), 37, the courts will conclude that the individual names of the persons authorized to represent the corporation, to which scroll seals were attached, were intended as the corporate seals. In that case it appeared that a majority of the trustees of the Glasgow Academy joined in a deed conveying its real estate, signed with their names with scroll seals attached. Subsequently in an action of ejectment the validity of this deed was questioned, and the point was made that it did not purport to be executed under the corporate seal. In ruling that the deed was well executed the court say:

"The execution of the deed purports to be a corporate act. It is executed in the corporate name, by the majority of those persons who are constituted the body, and purports to be a conveyance of the donation lands vested in them as such.

"The deed throughout indicates a clear intention to convey, in their corporate, fiduciary character, as trustees, and not as individuals; and in the conclusion they have not denominated the seals by which they testify it their *individual* seals. Inasmuch, therefore, as they had the right to

adopt the scroll as their seal—and it does not appear that they had any other seal as a corporation—and the act attempted to be done is a corporate act, and in the name of the corporate body, and done by those entrusted with the powers conferred by the act, and they have not denominated the scroll their individual seals, we may well intend the scrolls were used as their corporate seal.

"To presume that they are their individual seals would be to presume that which they have not said, and which would be repugnant to the manifest intention of the parties and the whole object and tenor of the instrument. To indulge in such presumption would be to destroy and not to sustain the deed—to defeat the intention of the parties, and not to carry it into effect. Such presumption should not, therefore, be indulged, or such construction given to the deed or the scrolls which are used. As the scrolls may be used by a corporation, we should rather presume that they were used as their corporate seal, especially as that presumption supports the deed and comports with the clear object of the instrument.

"The fact that separate scrolls are attached to the names of each of the trustees can make no difference. If the scroll used was intended to be the seal of the corporation, its repetition cannot detract from the validity of the deed. And as several individuals conveying, as such, might adopt a single seal, or separate seals for each, and the deed would be good, so all the corporators might use a single corporate seal, or attach the corporate seal to each name signed to the instrument; and as the trustees, in this case, deemed it necessary for each trustee to sign his name, it may have been deemed equally necessary for each to attach the corporate seal."

Much stress is laid in the brief of counsel for the plaintiff in error on a supposed modification by parol of the covenant sued on; but the record discloses no such modification, and the brief fails to point out or suggest in what particular the contract was modified.

True it may be that the defendant in error determined in August of 1887 to abandon the contract, when the Commissioners insisted that the man Hoyt should inspect the pipe

and report to them whether or not it came up to contract requirements. This because, owing to the delay on the part of the District, it was considered impossible to cast the large quantity of pipe called for by the contract, and as much more as Hoyt might see fit to reject, within the time limited. As shown by his subsequent conduct, and as pointed out by Mr. Wood in his letter of September 6, 1887, Hoyt was "not a proper man for the position" (R., p. 26).

At the Ludlow interview, some days later (R., p. 35), no formal agreement was entered into and no modification of the covenant was made or attempted. All that Colonel Ludlow agreed to on that occasion was that "no injustice would be done the plaintiff." That he did not consider this a modification of the covenant is shown by his subsequent conduct in imposing full penalties for delay in delivering the pipe, according to the strict letter of the contract.

But this interview was not referred to in the instructions to the jury granted at the request of the plaintiff below, nor in the charge of the court, nor yet was it claimed or pretended at the trial that it worked a modification of the covenant. There was also an utter absence of proof tending to show when the contract was signed by Mr. Webb, one of the Commissioners. Until he signed, it was not an executed contract. There was, therefore, no date fixed by the proofs at which the 136-day period given for full performance should begin. So the District failed to show the slightest justification for imposing any of the penalties prescribed by the contract.

The discharge from full performance consequent upon Captain Symons' telegram of December 2 (R., p. 33) made no change in the District's liability on the covenant, and for the reason that the contract provided that "payments will be made after August 1 and September 15 for all pipes, valves, and castings received and accepted in proper order and condition," less 20 per cent., &c. The action of covenant might, therefore, have been invoked,

after each delivery of pipe, for the contract price of such delivery, had payment been demanded and refused. That there was subsequently a "satisfactory completion" of the contract, entitling the contractors to demand the 20 per cent. reserved, is abundantly shown by the conduct of the District officials at the time. It was at their request that no more pipe was cast; but this made no change in the covenant to pay the contract price for such as might thereafter be "received and accepted."

The only other feature of the dealings between the District and the contractors, from which a parol modification of the covenant can be claimed, is the correspondence between Captain Symons and Mr. Wood, beginning with the telegram of November 30th (R., pp. 32, 33). The request of Captain Symons that no further pipe be cast was acceded to by Mr. Wood, with the proviso that all pipe then "cast shall be taken and paid for at the regular contract price, without any deduction." To this proviso the Enginneer Commissioner did not directly assent, but by a letter dated December 2 he directed the contractors "to send on and deliver the pipe which is now made and accepted by our inspector" (R., p. 34). In the light of this correspondence, it was contended by the plaintiff below that the District was estopped from claiming penalties as for delay in the subsequent deliveries of pipe, and at the plaintiff's request an instruction to the jury was given, predicated of "silence and conduct," not *contract* (R., p. 52). To adopt the quaint language of Lord Coke, the jury were told that "a man's owne act or acceptance stoppith or closeth his mouth to alleage or plead the truth."

However this be, the plaintiff in error cannot be heard to complain, because, as has been shown, it failed to adduce any evidence tending to show at what time the 136-day period provided for performance should begin. Till this was done, there was no predicate for the imposition of fines and penalties as for delay in performance of the contract.

Nothing is claimed in the suit except that the plaintiff in error shall pay for the pipe, accepted by its inspector and subsequently delivered, the price stipulated in the special contract. And the District of Columbia so far waived "absolute performance as to consent to be liable on its covenant for the contract price" of the material actually delivered.

See Phillips, etc., *vs.* Seymour, 91 U. S., 651.

It is also claimed in the brief of counsel for defendant in error that the plaintiff below was guilty of laches and should not, therefore, have interest on its demand, and for the unique reason that it "acquiesced in the settlement of the account, abandoned its claim against the defendant, and appealed to Congress for relief." But this contention is not well founded, for it appears that immediately upon receiving the District auditor's statement of the account, officers of the Camden Iron Works came to Washington and protested against the utter confiscation of their material, as shown on that statement. Its president, Mr. Wood, made two trips to Detroit to see Colonel Ludlow, in the hope that he would, though no longer the Engineer Commissioner, recommend a readjustment of the account. Though he declined to do this, efforts were still made by letter and personal solicitation to have the account properly stated, without avail, and it was not until November 21, 1892, that the Commissioners finally declined to restate the account and pay for the pipe.

In the same letter the defendant in error was advised by the Commissioners to apply to Congress for relief. In all of this there is no evidence of laches on the part of the defendant in error. The appeal to the courts was made as soon as it was found that payment could not be secured in any other way. Even this has proven a slow process, for already nearly six years have passed since the suit was begun.

To again refer to the opinion of Agnew, J. (62 Pa. St. 307), the defense to this action "is an attempt to impale an honest debt on the sharp points of the law, which ought not to succeed, and we think the corrective power of the court is sufficient to prevent it."

Wherefore it is respectfully submitted that there is no error in the record, and that the judgment of the court below should be affirmed.

SAMUEL MADDOX,
Attorney for Defendant in Error.

Supreme Court of the United States.

No. 172.—October Term, 1900.

The District of Columbia, Plaintiff in Error, vs. The Camden Iron Works. } In error to the Court of Appeals of the District of Columbia.

[May 13, 1901.]

This was an action of covenant brought in the Supreme Court of the District of Columbia by the Camden Iron Works, a corporation created under the laws of the State of New Jersey, against the District of Columbia, to recover the price of certain iron pipe manufactured for and delivered to defendant by plaintiff in pursuance of a contract under seal. Several pleas were interposed, and among them the plea of *non est factum*, and the plea of the statute of limitations of three years. To the latter plea a demurrer was sustained, and issue was joined on the others. The case went to trial and resulted in a verdict in favor of the plaintiff below for $11,044.16, with interest from February 27, 1888. A motion for new trial having been overruled, judgment was entered on the verdict, whereupon defendant carried the case to the Court of Appeals of the District, where the judgment below was affirmed. 15 App. D. C. 98. This writ of error was then sued out.

The contract bore date June 29, 1887, and, by its terms, purported to be made by the District of Columbia of the first part, and the Camden Iron Works, by Walter Wood, president, of the second part. It concluded as follows:

"In witness whereof, the undersigned, William B. Webb, Samuel E. Wheatley, and William Ludlow, Commissioners of the District of Columbia, appointed under the act of Congress entitled 'An act providing a permanent form of government for the District of Columbia,' approved June 11, 1878, and the party of the second part to these presents have hereunto set their hands and seals the day and year first above written.

(Signed) William B. Webb, [L. S.]
(Signed) S. E. Wheatley, [L. S.]
(Signed) William Ludlow, [L. S.]
Commissioners of the District of Columbia.

(Corporate seal Camden Iron Works.)

(Signed) Walter Wood, *Pres't Camden Iron Works.*"

The contract was proved and offered in evidence, but its admission was objected to by defendant on the ground that it was not under the corporate seal of the District of Columbia. The objection was overruled, and de-

fendant excepted. The evidence showed that no action was taken by the temporary board of Commissioners appointed under the act of Congress approved June 20, 1874, looking to the adoption of a corporate seal for the District, and none by the permanent board appointed under the act of Congress of June 11, 1878, until September 23, 1887, when the board passed an order that the seal of the District of Columbia, as adopted by an act of the legislative assembly of August 3, 1871, be placed in the official charge and custody of the secretary of the board; and it further appeared that this seal was not generally used until after the contract had been entered into, but was affixed to deeds conveying real estate, to bonds and securities, and, in some cases, to tax deeds. Plaintiff further proved that the contract was not in fact executed and delivered by the Commissioners before August 4, 1887. The evidence to this effect was objected to by defendant, the objection overruled and exception taken.

The opinion of the Court of Appeals further states the facts as follows:

"The contract provided for the manufacture of certain designated sizes of iron pipe by the plaintiff, and its complete delivery to the defendant, 'within 136 days *after the date of the execution* of the contract; one-half of each size to be delivered on or before September 25, 1887, and the remainder on or before November 10, 1887.' For failure to deliver the pipes within the time thus fixed, the contract provided that there should be deducted from the contract price, as in said contract specified, one per cent. of the contract price for all delinquent articles for each and every week day that they remained delinquent.' There was a further provision that for failure to complete the work at the time specified, there should be deducted from the money to become due under the contract 'the sum of ten dollars *per diem* for the same period estimated as liquidated and fixed damages to the District.'

"In the contract there was a provision made for inspecting the iron pipes and 'to determine whether there was any reason for rejection, prior to delivery.' Payments were to be made after August 1, 1887, for all pipe 'received and accepted in proper order and condition, less twenty per cent. of the amount found due, to be reserved until the satisfactory completion of the contract.'

"There appears to have been a suspension in the execution of the contract, owing to misunderstandings as to the qualities of the work, and the inspection thereof; and consequently, but a small proportion of the pipe was delivered prior to November 30, 1887. But after that date, pipe worth $11,404.09, at contract rates, according to estimate made, was delivered to and accepted by the District of Columbia, and used by the corporation. The total value, at contract rates, of all the pipe delivered to and accepted by the District of Columbia was $16,335.87, on which there was paid in cash $5,291.71, by two checks, which did not indicate that they were meant to be in full settlement of all moneys due under the contract; and the balance, $11,044.16, was more than counterbalanced by the fines and penalties charged up by the defendant for non-delivery of the pipe within the time specified in the contract. It was for this balance of $11,044.16 with interest thereon from the 27th of February, 1888, that this action was brought. There is no pretense that there was any demand

made by the defendant for any more or other quantity of pipe than that delivered under the contract and which was refused to be delivered by the plaintiff. On the contrary, on November 30, 1887, when Captain Symons, the Assistant Engineer Commissioner of the District, requested that no more pipe should be cast for delivery under the contract, there remained to be cast about 340,000 pounds, on which the profits to the plaintiff, at contract prices, would have been about $1,300. After the plaintiff's letter of November 30, 1887, assenting to the cancellation of the contract, *as to all pipe not then manufactured*, provided all pipe then manufactured should be taken and paid for at contract rates, without deductions, and Captain Symons' reply thereto, directing the sending on of the pipe then cast and accepted by Hoyt, the value of the pipe, at contract rates, actually shipped to the defendant, was $11,404.16. It was for this amount that the verdict was rendered, with interest, and without any allowance or deductions for forfeitures or penalties for non-delivery of pipe within the time prescribed by the terms of the contract."

Certain instructions to the jury were requested and given by the court on plaintiff's behalf. Instructions were also asked on behalf of defendant, and refused. To the rulings of the court in granting the instructions given for plaintiff, and in refusing the instructions asked for defendant, defendant duly excepted. The court also charged the jury generally, to which charge or any part thereof no exceptions were taken.

The errors assigned were to the effect that an action of covenant would not lie on the contract because it was not under the seal of the District of Columbia; that it was not competent for plaintiff below to show by parol evidence that the contract was finally executed and delivered by defendant at a date subsequent to that mentioned in the contract itself, from which latter date the time allowed for the manufacture and delivery of the pipe should be computed; that the manufacture and delivery of the pipe within the time mentioned constituted a condition precedent, and that no recovery could be had on the contract for any pipe delivered to and accepted by defendant after the time specified for delivery; that if plaintiff was entitled to recover for pipe delivered after the times mentioned, defendant was entitled to offset the penalties against the contract price as liquidated damages; and that no interest ought to have been allowed in the recovery.

Mr. Chief Justice FULLER delivered the opinion of the Court:

The first section of the act "to provide a government for the District of Columbia," approved February 21, 1871, (16 Stat. 419, c. 62,) provided: "That all that part of the territory of the United States included within the limits of the District of Columbia be, and the same is hereby, created into a government by the name of the District of Columbia, by which name it is hereby constituted a body corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corpora-

tion not inconsistent with the Constitution and laws of the United States and the provisions of this act."

A governor and legislature were created; also a board of public works, to which was given the control and repair of the streets, avenues, alleys and sewers of the city of Washington, and all other works which might be intrusted to their charge by either the legislative assembly or Congress. They were empowered to disburse the moneys received for the improvement of streets, avenues, alleys, sewers, roads and bridges, and to assess upon adjoining property specially benefited thereby a reasonable proportion of the cost, not exceeding one-third.

June 20, 1874, an act was passed entitled "An act for the government of the District of Columbia, and for other purposes." 18 Stat. 116, c. 337. By this act the government established by the act of 1871 was abolished, and the President by and with the advice and consent of the Senate was authorized to appoint a commission, consisting of three persons, to exercise the power and authority vested in the governor and the board of public works, except as afterwards limited by the act.

By a subsequent act approved June 11, 1878, (20 Stat. 102, c. 180,) it was enacted that the District of Columbia should "remain and continue a municipal corporation," as provided in section two of the Revised Statutes relating to said District, (brought forward from the act of 1871,) and the appointment of Commissioners was provided for, to have and to exercise similar powers given to the Commissioners appointed under the act of 1874.

This legislation is considered and set forth in *Metropolitan Railroad* v. *District of Columbia*, 132 U. S. 6.

By section thirty-seven of the act of February 21, 1871, (which is applicable to the present Commissioners, *District* v. *Bailey*, 171 U. S. 175,) it was provided that "all contracts made by the said board of public works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the secretary of the District; and said board of public works shall have no power to make contracts to bind said District to the payment of any sums of money except in pursuance of appropriations made by law, and not until such appropriations shall have been made."

Section five of the act of June 11, 1878, provided: "All contracts for the construction, improvement, alteration, or repair of the streets, avenues, highways, alleys, gutters, sewers, and all work of like nature, shall be made and entered into only by and with the official unanimous consent of the Commissioners of the District, and all contracts shall be copied in a book kept for that purpose and be signed by the said Commissioners, and no contract involving an expenditure of more than one hundred dollars shall be valid until recorded and signed as aforesaid."

On March 3, 1887, an act of Congress was approved, by which the sum of $100,000 was appropriated for "repairing and laying new mains," and "lowering mains," and for engineers and others under the water department of the District government. 24 Stat. 580, c. 389.

The contract in this case was signed by all of the Commissioners and recorded in a book kept for that purpose as required by the act of Congress. Unquestionably the Commissioners when they executed the contract were authorized to purchase iron pipe for the extension of the water service, and as the municipal corporation had the right to have a seal, which could be changed from time to time, it had the right to execute contracts under seal. The principal objection here is, however, that this was not the sealed obligation of the District. It is conceded that the Commissioners, who signed the contract officially, were not personally liable thereon, and that the contract bound the District, but it is insisted that the contract was not a specialty. The opinion of the Court of Appeals by Chief Justice Alvey satisfactorily disposes of this objection, and we concur with the views therein expressed.

The board of Commissioners was constituted by statute to carry the powers of the municipal corporation called the District of Columbia into effect. The Commissioners could adopt for the corporation any seal they chose, whether intended to be permanently used, or adopted for the time being. When, acting officially, as in this instance, they signed and sealed the instrument as for the corporation, their signatures and seals bound the corporation as by a specialty. As Judge Putnam said in *Mill Dam Foundry* v. *Hovey*, 21 Pick. 428: "A corporation as well as an individual person may use and adopt any seal. They need not say that it is their common seal. The law is as old as the books. Twenty may seal at one time with the same seal."

The general rule is "that when a deed is executed, or a contract is made on behalf of a State by a public officer duly authorized, and this fact appears upon the face of the instrument, it is the deed or contract of the State, notwithstanding that the officer may be described as one of the parties, and may have affixed his individual name and seal. In such cases the State alone is bound by the deed or contract, and can alone claim its benefits." *Sheets* v. *Selden's Lessee*, 2 Wall. 187; *Hodgson* v. *Dexter*, 1 Cranch, 345.

As to private corporations, where authority is shown to execute a contract under seal, the fact that a seal is attached with intent to seal on behalf of the corporation, is enough though some other seal than the ordinary common seal of the company should be used. *Jacksonville Railroad Co.* v. *Hooper*, 160 U. S. 514; *Stebbins* v. *Merritt*, 10 Cushing, 34; *Bank* v. *Railway Company*, 30 Vt. 159; *Tenney* v. *East Warren Lumber Company* 43 N. H. 343; *Porter* v. *Railroad Company*, 47 Me. 349; *Phillips*

v. *Coffee*, 17 Ill. 154. Many of these cases are cited by Judge Dillon in his work on Municipal Corporations, (4th ed.) § 190, where he says: "Respecting seals, the same general principles apply to private and to municipal corporations. Thus, a corporation of the latter class would doubtless be bound equally with a private corporation by any seal which has been authoritatively affixed to an instrument requiring it, though it be not the seal regularly adopted."

Under the former corporate organization of the District a seal had been adopted, but it was not until after this contract was entered into that the board took official action in respect of it. It is to be assumed on this record that the Commissioners affixed their seals as the seal of the corporation. It was for them to determine whether the interests of the District required the contract to be sealed.

We agree with the Court of Appeals that this contract was not only the contract of the District, as is conceded, but that it was its deed, upon which an action of covenant could be maintained. It was therefore properly admitted in evidence, and recovery could be had thereon, if otherwise justified. As such an action is not barred in three years the demurrer to the plea of the three years statute of limitations was necessarily sustained.

The next proposition of the District, that it was not competent for plaintiff below to show by parol that the contract was finally executed and delivered by the District at a date subsequent to the date of the contract, is without merit. The contract did not provide that the work was to be completed within one hundred and thirty-six days from its date, but "after the date of the execution of the contract." It is well settled that, in such circumstances, it may be averred and shown that a deed, bond or other instrument was in fact made, executed and delivered at a date subsequent to that stated on its face.

In *United States* v. *Le Baron*, 19 How. 73, it was ruled that a deed speaks from the time of its delivery, not from its date; and Mr. Justice Curtis, who gave the opinion, cited *Clayton's case*, 5 Coke, 1; *Oshey* v. *Hicks*, Cro. Jac. 263, and *Steele* v. *Mart*, 4 B. & C. 272. To which the Court of Appeals added *Hill* v. *Cazenove*, 4 East, 477. These cases fully sustain the doctrine that parties, situated as here, are not precluded from proving by parol evidence when a deed or contract is actually made and executed, from which time it takes effect.

In *Williams* v. *Bank*, 2 Pet. 102, it was laid down as a general principle of law that "If a party to a contract who is entitled to the benefit of a condition, upon the performance of which his responsibility is to arise, dispense with, or by any act of his own prevent the performance, the opposite party is excused from proving a strict compliance with the condition. Thus, if the precedent act is to be performed at a certain time or place, and a strict performance of it is prevented by the absence of the

party who has a right to claim it; the law will not permit him to set up the non-performance of the condition as a bar to the responsibility which his part of the contract has imposed upon him."

In this case the further performance of the contract was determined by the consent of the parties, but the contract was not rescinded except as to the future manufacture of pipe for delivery.

The third objection of the District is that an action of covenant on the contract would not lie to recover the price of the pipe that was delivered, because there had not been full performance; yet the pipe, to recover the price for which this action was brought, was, as the Court of Appeals said, manufactured, delivered, and accepted under the contract, in part performance thereof, and with reference to the specifications and price agreed upon as set forth in the contract. The dispensation of complete performance did not make a new contract, nor alter the terms of the existing agreement. It was a mere waiver of further performance.

It is said that the demurrer to the plea of limitations, the ninth plea, ought to have been carried back to the declaration. The hearing of that demurrer was reserved by stipulation to the trial of the cause, no suggestion of this kind was then made, and the declaration was good as against a general demurrer. The company averred full performance, "except in so far as it was prevented or discharged from so doing by the defendant." That was not setting up a modified or substituted contract, but a waiver of a condition precedent to be performed by plaintiff.

In *McCombs* v. *McKennan*, 2 S. & W. 216, it was held that covenant may be sustained upon a contract under seal, notwithstanding by subsequent consent of the parties the place at which the articles called for were to be delivered was changed.

In *Construction Company* v. *Seymour*, 91 U. S. 646, it was held that defendant was liable on his covenant for the contract price of the work when completed, where absolute performance had been waived. And in many cases of prevention by the defendant or of tender and refusal, the plaintiff has been held to have the right of action on a special contract, prevention or refusal being equivalent for that purpose to performance.

Assuming that full performance was dispensed with the court did not err in ruling that the right to sue upon the contract remained.

The court gave to the jury, on behalf of plaintiff, the following instructions:

"If the jury believe from the evidence that the plaintiff corporation was prevented from completing the delivery of pipe by it stipulated to be manufactured and delivered under the contract offered in evidence within the time or times therein limited by any act or omission on the part of the defendant, then the defendant is not entitled to charge against the plaintiff any fines or penalties for such delay in delivering pipes as was occasioned by such act or omission.

"If the jury believe from the evidence that the defendant, by its silence or conduct, caused the plaintiff corporation to believe, on or about the 1st day of December, A. D. 1887, that all pipe thereafter delivered would be taken and paid for at contract rates, without any deduction, and thereby induced the plaintiff to act on that belief and thereafter deliver pipe to the defendant, which the plaintiff would not have otherwise done, and the defendant accepted such pipe, the defendant is estopped from charging against the plaintiff any fines or penalties for not delivering such pipe within the time or times specified by the contract."

Defendant asked the following instruction, which the court refused to give:

"If the jury believe from the evidence that the failure of plaintiff to deliver the iron pipes mentioned in the contract given in evidence at the times and in the quantities specified, hindered and delayed the defendant in extending the water service in 1887, then the defendant had a right to charge against the price it agreed to pay the plaintiff for the pipe it undertook to deliver as liquidated damages the penalties provided in the contract."

The fourth question is whether the court erred in these rulings. Defendant's instruction was clearly wrong, and it seems to us that plaintiff's instructions fairly submitted the contention as to penalties and forfeitures to the jury. If strict performance by plaintiff was prevented or waived by defendant as contended on the facts, then the claim for fines or penalties for delay or failure to deliver the pipe could not be sustained.

The court left the matter of interest to the jury, and refused to give at defendant's request an instruction that no interest should be allowed except from the time of the institution of the suit. Exception was taken to this refusal, but, in view of the evidence, the trial court committed no error in that regard. Rev. Stat. D. C. § 829; *Washington &c. R. R. Co.* v. *Harmon's Admr.*, 147 U. S. 585. To the general charge of the court in respect of interest no exceptions were preserved.

Judgment affirmed.

Mr. Justice BROWN and Mr. Justice MCKENNA dissented.

True copy.

Test:

Clerk Supreme Court, U. S.